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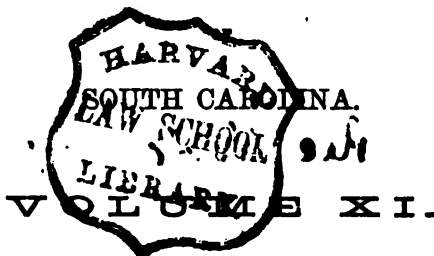
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REPORTS OF CASES AT LAW,
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
AND
COURT OF ERRORS



CONTAINING CASES FROM
NOVEMBER 1857, TO DECEMBER 1858, INCLUSIVE.

BY J. S. G. RICHARDSON,
STATE REPORTER.

CHARLESTON, S. C.
McCARTER & DAWSON.
1859.

KF5
1845
1849
1844
v. 11
= 45 v. c.

Rec Nov 8, 1869

JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME.

Judges of the Court of Sessions and Common Pleas,

AND OF THE

 Law Court of Appeals:

HON. JOHN B. O'NEALL,

" DAVID L. WARDLAW,

" THOMAS J. WITHERS,

HON. JOSEPH N. WHITNER,

" THOMAS W. GLOVER,

" ROBERT MUNRO.

Chancellors and Judges of the Court of Appeals in Equity:

HON. JOB JOHNSTON,

" BENJAMIN F. DUNKIN,

HON. GEORGE W. DARGAN,

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Middle " SIMEON FAIR, Esq.

Northern " C. D. MELTON, Esq.

Southern " W. A. OWENS, Esq.

TABLE OF CASES

REPORTED IN THIS VOLUME.

Bancroft, Betts & Marshall vs. McKnight 668	Bruce vs. Perry, Bruce vs. Morgan, 121
Promissory notes—Collateral Security.	Renunciation of inheritance—Evi- dence.
Bank of Charleston vs. Cham- bers & Frost, 657	Burkett vs. Moses, 432
Promissory note taken as collateral security—Evidence—Consideration —Accommodation Indorser—Costs —Witness.	Assignment—Obese in action—Dis- count—Notice.
Bank of the State of South Carolina vs. Bobo, . . . 597	Cantey, <i>Ex parte</i> , 520
Trespass to try title—Judgment—Evi- dence—Corporation—Agent—Stock- holder—New trial—Location.	Insolvent Debtors' Act—Notice.
Bank of the State of South Carolina vs. Bridges, . . . 87	Carter vs. Estes, 363
Trespass to try title—Estoppel—Title subsequently acquired.	Costs—Executors and Administrators —Trover.
Barbour vs. Disher, . . . 347	Carter vs. King, 125
Frauds, Statute of—Contract.	Single bill—Consideration—Testamen- tary paper—Nudum Pactum.
Barnes, Bateman & Ruddle- row vs. Bell, 20	Chalk vs. McAlily, 153
Practice—Right to appear and plead at Second Term.	Practice—Continuance—Easements— Adverse use—Backing water in channel of stream—Damages—Cases approved.
Bearden vs. Smith, 554	City Council of Charleston vs. Schmidt, 343
Contract—Penalty—Liquidated dam- ages.	Practice—Process—Test—City Council —License—Penalty—Release.
Belk vs. Massey, 614	Clanton vs. Young, 546
Recording—Notice—Possession—Fraud —New trial.	Contract—Reward—Condition prece- dent.
Berry vs. Jourdan, 67	Clark vs. Way, 621
Evidence—Proof of contents of lost deed—Refreshing memory.	Easement—Right to use timber—Tres- pass Quare Clausum Fregit.
Binda vs. Benbow, 24	Commissioners of Roads vs. Durant, 440
Trespass to try title—Estoppel—Tres- pass.	Road Laws—Manning, streets of—Ju- ridiction.
Bivingsville Cotton Manuf. Company vs. Bobo, . . . 386	Connor vs. Hillier, 193
Confession of judgment—Partners— Corporation—Ratification.	Trover for certificate of bank stock— Damages.
	Conyers vs. Rhame, 60
	Voluntary escape—Sheriff—Forged bail bond.

- Crouch vs. Culbreath**, . . . 9
Unsoundness—Evidence—Warranty.
- Curry vs. Sims and Jeter**, . . 489
Wills and testaments—Limitation of estates—Executory devise.
- Douglass vs. Dickson**, . . . 417
Dower—Estoppel—Power—Executors—Transitory seisin.
- Edwards vs. Edwards**, . . . 537
Evidence—Lost deed.
- Etters vs. Etters**, . . . 413
Evidence—Magistrate's judgment.
- Faries vs. Smith**, 80
Warranty—Breach of covenant for quiet enjoyment against warrantor himself.
- Frierson vs. Wesberry**, . . . 353
Homestead Act—Executor de son tort.
- Fuller vs. Eddings**, . . . 239
Property taken for public use—Compensation—Damages.
- Gardelle & De Laigle vs. South Carolina Railroad Company**, 337
Bailment—Carriers—Warehousemen—Negligence.
- Geer vs. Brown**, 42
Special contract—Pleadings.
- Gibbes vs. Vincent**, . . . 323
Death, presumption of—Evidence.
- Godbold vs. Gordon, Godbold vs. Campbell**, . . . 86
Practice—Scire facias.
- Gourdin vs. West & Robinson**, 288
Salvage—Master and slave.
- Green vs. Foskett**, . . . 332
Insolvent Debtors' Act—Trove.
- Guynemer vs. Lopez**, . . . 199
Promissory note—Indorser—Release.
- Hadden vs. Leibeschnltz**, . . 505
Slave, unlawful beating of.
- Hamilton vs. Hamilton**, . . 351
Prison Bounds Act, discharge under—Estoppel.
- Hammaraskold vs. Bull**, . . 493
Public agents—Pleading—Evidence—Contract.
- Harrell vs. Petty**, . . . 373
Discount—Judgment—Assignment.
- Harrison vs. Dodson**, . . . 48
Sum. Pro.—Practice—Answer—Evidence.
- Harvin vs. Weeks**, . . . 601
Bond—Executory contract—Fraud on creditors.
- Haynsworth vs. Frierson**, . . 476
Executors and Administrators—Administration—Assets—Sheriff.
- Henderson vs. Planters' B'k of Fairfield**, 44
Mistake, money paid by.
- Hewitt, Ex parte**, . . . 326
Parent and child—Infant, custody of.
- Heyward vs. Chisolm**, . . . 253
Highway—Pleading—Plea—Justification—Adverse use—Fence.
- Hope vs. Johnston & Cavis**, 135
Release not under seal—Nudum Pactum—Payment.
- Hudson vs. Brown**, . . . 643
Single bill—Agreement to compound a felony—New trial.
- Huguenin vs. Legare & Colcock**, 204
Factors—Mistake—Insuring.
- Ingram vs. Wilson**, . . . 461
Pleading—Bond, construction of.
- Jefcoat vs. Knotts & Redmond**, 649
Husband and wife—Abatement—Case—Ways—Damages.
- Jervy vs. Straus**, . . . 376
Assignee of bond or note—Discount—Evidence.

- Johnson vs. Ballard**, . . . 178
Non compos—Necessaries—Implied promise—Son-in-law—Limitations, Statute of—Promise by administrator.
- Josey vs. Wil. & Man. Railroad Company**, . . . 399
Evidence—Negligence—Witness—Bond of indemnity—Damages—New trial.
- Landrum vs. Hatcher**, . . . 54
Trespass to try title—Lands contracted for after will made, to whom they go—Sheriff's deed void—No estoppel.
- Leger vs. Doyle**, . . . 109
Sheriff—Sheriff's sale—Conveyance—Registry—Recording—Cases approved.
- Lewis vs. Wil. & Man. Railroad Company**, . . . 91
Railroads, compensation for lands taken by—Vendee.
- Maffit, Ex parte**, . . . 358
Insolvent Debtors' Act—Practice.
- McAllister vs. Tate**, . . . 509
Wills and testaments—Evidence—Limitation of estates.
- McCoy vs. Lemon**, . . . 165
Mayhem—Damages, increase of by Court.
- McMillan vs. Whitaker**, . . . 523
Bail bond—Practice—Pleading.
- McPherson vs. Neuffer & Hendrix**, . . . 267
Factor—Lien—Merchant's books—Waiver—Trover—Bill of lading—Conversion.
- Meador vs. Rhyne**, . . . 631
Judgments—Set-off—Equity.
- Mitchell vs. Bogan**, . . . 686
Mortgage—Power to sell—Deed—Delivery.
- Mitchum vs. Droze**, . . . 196
Abatement—Pleadings.
- Moore vs. Smith**, . . . 569
Trover—Administration on estate of living person.
- Myers vs. Griffin & Powell**, 560
Husband and wife—Pleadings—Trover.
- Neal vs. Neal**, . . . 83
Contract—Indebitatus assumpsit—Money had and received.
- Ordinary vs. Pettus**, . . . 543
Administration bond—Pleadings—Ordinary's decree.
- Peake vs. Scaife**, . . . 672
Bailment—Contract—Hire and letter to hire—Physician's bill.
- Planters' Bank of Fairfield vs. Bivingsville Cotton Manuf. Company**, . . . 677
Bills of exchange—Usury.
- Raiford vs. French**, . . . 367
Evidence—Declarations of Agent.
- Richardson vs. Dingle**, . . . 405
Evidence—Witness—Hiring—Contract—Slaves.
- Russell vs. Tunno, Pinckney & Co.**, . . . 303
Law of Nations—Personal property—Foreign assignment—Contract—Attachment—Debtor and creditor—Evidence—Subscribing witness.
- Ryan vs. Copes**, . . . 217
Nuisance—Danger—Loss—Verdict—New trial—License.
- Sams vs. Shield**, . . . 182
Evidence—Office copy of deed—Seal, proof of.
- Sims vs. Smith**, . . . 565
Copartnership.
- Sloan vs. Bangs & Co.**, . . . 97
Partnership—Contract—Competency of witness.
- Southern vs. Cunningham**, . . . 533
Contract—Conditional sale—Trover—Vendor and Vendee.
- Spires vs. Ordinary**, . . . 578
Ordinary—Jurisdiction—Partition of lands.

- State *vs.* Brock, 447
 Trading with slave—Indictment.
- State *vs.* Caspary, 356
 Bastardy—Indictment.
- State *vs.* Clayton & Carter, 581
 Venire facias—Grand Jury—Petit Jury
 —Practice—Constitutional law—Negro stealing—Indictment—Evidence
 —Confession.
- State *vs.* Commissioners of
 Roads, 485
 Road laws—Jurisdiction of Commissioners of Roads—Alterations.
- State *vs.* Hatcher, 525
 Presumption—Lapse of time—Verdict and sentence.
- State *vs.* Jefcoat, 529
 Nuisance—Gates across highways—Private paths—Ways.
- Trammell *vs.* Trammell, . . 471
 Easement—Contract—Frauds, Statute of—Case—Trespass.
- Trumbo *vs.* Reigne, 189
 Ordinary—Guardian—Jurisdiction.
- Trustees of the Wadsworth-
 ville Poor School *vs.* Mc-
 Cully, 424
 Presumptions—Conveyance—Limitations, Statute of.
- Union Bank of Ga. *vs.*
 Hodges & Smith, . . 480, 724
 Pleading—Former recovery—Copartners.
- Vance *vs.* Davenport, . . . 517
 Executor—Single bill—Failure of Consideration.
- Walter *vs.* Richardson, . . . 466
 Action—Account current—Payment.
- Wardlaw, Walker & Burn-
 sides *vs.* Harrison, . . . 626
 Guaranty—Notice of acceptance.
- Wardlaw, Walker & Burn-
 sides *vs.* So. Ca. Rail-
 road Company, 337
 Bailment—Carriers—Warehousemen
 —Negligence.
- Williams, *Ex parte*, 452
 Parent and child—Infant, custody of—Habeas Corpus—Practice.
- Wilson *vs.* Huggins, 410
 Implied contract—Executors and Administrators.
- Windham *vs.* Rhame, 283
 Damages—Case—Public nuisance.
- Winnsboroq *vs.* Smart, . . . 551
 Corporation—Ordinance—Markets—Trade.
- Wright *vs.* McCann & Wil-
 son, 144
 Patent—Jurisdiction—Covenant—Warranty.
- Young *vs.* De Bruhl, 638
 Grants bearing same date—Tenants in common.
- Zeigler *vs.* Braddy, 557
 New Trial—Special damages.

CASES AT LAW,
ARGUED AND DETERMINED IN THE
COURT OF APPEALS OF SOUTH CAROLINA.

Columbia—November and December Term, 1857.

JUDGES PRESENT.

HON. JOHN B. O'REALL,
" DAVID L. WARDLAW,
" THOMAS J. WITHERS,

HON. JOSEPH N. WHITNER,
" THOMAS W. GLOVER,
" ROBERT MUNRO.

JOHN CROUCH & COMPANY vs. EDWARD CULBREATH.

Unsoundness—Evidence—Warranty.

In questions of unsoundness where the disease is chronic, like rheumatism, it is not necessary to show that the symptoms existed at the time of the sale, for subsequent incidents and appearances may show that the disease existed before the sale, although the symptoms had not then been observed.

The point ruled in *Stephens vs Chappell*, 3 Strob. 80, that, "the disease must be in a formed state evidenced by symptoms before it can affect the sale," was intended to apply only to cases of fever having no fixed law for their commencement.

The term "organic" used in the opinion of the Court of Appeals in that case was inappropriate, and the Court prefer to adhere to the precise ruling of the Circuit Judge in that case.

Crouch vs. Culbreath.

BEFORE WARDLAW, J., AT EDGEFIELD, FALL TERM, 1857.

The report of his Honor, the presiding Judge, is as follows:

“Assumpsit upon the warranty of a slave.

“The plaintiffs are John Crouch and Henry C. Culbreath, partners in the business of buying and selling slaves, both of whom, when at home, live at the house of the latter. The defendant, uncle of Henry C. Culbreath, is a farmer, and lives a mile from the plaintiffs.

“On the 18th of October, 1856, the defendant sold to the plaintiffs a young negro man named Vincent, for one thousand and sixty dollars, and signed an acknowledgment that he had received the said sum in payment for Vincent, to which were subjoined the words, ‘I warrant the said boy sound in body and mind.’ The plaintiffs allege that Vincent was then unsound.

“Dr. Pitts was called to examine Vincent at the house of the plaintiffs, some short time after the sale, the beginning of December, or beginning of January, (he rather thought the latter,) and made in company with Dr. Abney, as careful an examination as he could. It was possible that he might have been deceived by Vincent’s complaints; but his conclusion was that Vincent then had pains, stiffness of joints, and apparently a slight swelling of one ankle, and that these proceeded from chronic rheumatism under which he suffered. He considered the disease a difficult one to manage, liable to return after temporary relief, and almost ineradicable when once fixed—often proceeding from acute rheumatism, but often also appearing first in the chronic form, and growing gradually worse, sometimes to the stiffening of joints and other times to less troublesome results. On the day of examination Vincent was able to walk slowly, and since that time Dr. Pitts has occasionally seen him moving about, but has not examined him. From the beginning of 1854, the Doctor knew

Columbia, November and December, 1857.

Vincent—he practised by the year in the family of Edward Culbreath, and was never called to see Vincent, and never heard complaint from him before the examination.

“Two or three weeks after the sale, (time uncertain,) Dr. Pitts was present at defendant's house when the plaintiff, Crouch, offered some sum to defendant if he would take Vincent back, saying that he was not well; the defendant answered that the boy was sound when he sold him, and if he had become diseased since, he did not want him; that Vincent had jerked him down; for that he had sold him, and he would not have him back. Crouch threatened to sue.

“Dr. John P. Abney was called to examine Vincent about five weeks after the sale, and made an examination, but withheld his opinion then. Three or four days afterwards, he made another examination in company with Dr. Pitts. His opinion communicated to Dr. Pitts, and in which (he said) Dr. Pitts concurred, was that Vincent had had chronic rheumatism many years, and was then laboring under its effects. The ligaments of his joints were enlarged, and every tendon and muscle that stopped in those joints—the knee and ankle joints, the wrists too. In the words of this witness, ‘I did not say that he was then the subject of chronic rheumatism, but he was laboring under the effects of disease, the results could have come only from one of two diseases, rheumatism or scrofula. I believe that the enlargement of his joints was occasioned by scrofulous taint; and that the disease whose effects he was under, was scrofulous rheumatism. He could not bend his knee so as to touch his buttocks with his heels—he could not jump eighteen inches. I was not deceived. I cannot say whether his deformity was the result of disease, or of natural malformation; if the former, (as I believe it was,) the disease must have existed for many years; if the latter, the deformity existed from his birth. Scrofula, scrofulous rheumatism, and rheumatism are hereditary. I know old Isaac, Strother's property, the reputed father of Vincent, be-

Crouch vs. Culbreath.

tween whom and Vincent there is a strong resemblance—he had scrofula; affecting his hip joint, and causing ulceration of the thigh bone. Vincent, no doubt, had rheumatic pains for years, but may not have been stopped in his work a day.

“‘When I went the first time, Vincent was lying down rolling—said he had the belly-ache—complained much of pains—had excellent use of his tongue. Crouch was then making preparations to start westward with negroes—Vincent said he was mighty willing to go—would go any where, so he did not belong to a Culbreath. At the second examination, he walked into the house, but walked badly. I have seen him since frequently, but have not examined him; I think he has worked in H. C. Culbreath’s farm, but has not worked much. I would not have him to keep—do not think he is worth above fifty dollars.’

“Further testimony for the plaintiff was, that in August, 1853, in working upon the road, to some joke about the patrol, Vincent said that his ankles hurt him, and he could not run; and at another time before the sale, when a man, who was cutting on one side of a tree, whilst Vincent was cutting below on the other side, proposed to stand on his foot, he complained of pain in his ankle.

“That old Isaac and Vincent recognise each other, and are reputed as father and son, and that old Isaac goes on crutches.

“That shortly after the sale, (time indefinite,) Vincent was lent to a neighbor to help in killing hogs, and walked so badly, that the neighbor let him ride home.

“That for many years Vincent was observed to move badly, and his difficulty of motion has increased—a month before the trial he tried to jump, and could not exceed two feet.

“That H. C. Culbreath was not present when the defendant offered Vincent for sale to Crouch, and at that time the defendant said nothing of Vincent’s having jerked him down.

“That Crouch went with negroes to the West, leaving Vincent behind, and before he went, H. C. Culbreath made

Columbia, November and December, 1857.

offers to the defendant; first, of one hundred dollars to take Vincent back; second, to arbitrate; third, of two hundred dollars to rescind; all of which the defendant refused, saying that the boy was sound when he sold him, and that he would not have him again as he had jerked him down—and that H. C. Culbreath deprecated his uncle's displeasure, but said that he himself had had nothing to do with the trade, and declared that Crouch would sue; and that suit was afterwards commenced; and that Thomas Coleman, whose ankle had been distorted by rheumatism, saw in Vincent's appearance and gait what he considered evidence of rheumatism or something of that kind; deemed him since the sale unable to plough, and at the most not worth more than two or three hundred dollars.

"For the defendant, there was testimony that the defendant, by the agency of his son Isham, bought Vincent in 1845; that Vincent was then about ten years old, and since has grown to be a very large, stout and strong fellow; that he was always clumsy, and was (as it was variously termed) double-jointed, box-ankled, or African-footed; but that up to the sale he was considered perfectly sound by those who had the best opportunities for knowing him, and had never been known by any of them to complain, except once when he had a cold, which was removed by a dose of lye-tea. Those persons were Julius Dean, (a nephew of the defendant's, and a cousin of H. C. Culbreath's,) who had lived two years in defendant's house, and a longer time close by; Wesley Culbreath, a son of defendant's, who had often worked with Vincent, and one year was overseer; Dr. John Maynard, who lived in defendant's house and practised in his family 1849-1852; Ben. Saunders, who lived near to the defendant and Robert Bryan, Esq., whose daughter was married to Isham Culbreath (a son of defendant's, who lives on his plantation and superintends his business.) The last-named witness knew Vincent before the defendant got him and ever since;

Crouch vs. Culbreath.

considered him perfectly sound, and of a large and valuable family of negroes, and said that he could run before he was sold to the plaintiffs. Most of the others spoke of him as *gangling*, not active, but saw no change in his gait or in his ankles; further, that in April, 1857, H. C. Culbreath had sent Vincent to a log-rolling at Wesley Culbreath's, and in the division of hands, Vincent was chosen amongst the first; but of three witnesses who spoke of this log-rolling, all had been in a squad different from that which Vincent had been in, and the only work actually done by Vincent that day, which any one could testify to, was his helping to lift a heavy log, which was put down without being moved from the place it had lain in; that Vincent was once seen sawing with a cross-cut saw at H. C. Culbreath's, and was at a house-raising there, but did nothing; that H. C. Culbreath knew Vincent well; in 1855 had asked the defendant if he would sell him, but had made no offer for him: and when asked, in conversation with the defendant since the sale, if he had not been trying to buy him, had answered, "Yes, but Isham always asked too much for him." That R. M. Scurry (who was at the examination by the physicians, and had known Vincent from 1849, and had noticed his movements as slothful) had heard of the plaintiffs' proposition to lose two hundred dollars, and had concerted with Henry Chappell to buy Vincent if he could be got at eight hundred and sixty dollars, and had told this to the defendant the last of September, 1857—Scurry understanding, but not saying, that defendant was to warrant; upon this the defendant applied to Crouch, asking if he was willing to lose two hundred dollars; Crouch replied, "Yes, two hundred and fifteen dollars—that is interest on one thousand and sixty dollars for a year, and fees, amounting together to one hundred and fifteen dollars, and one hundred dollars additional—so that if you repay nine hundred and sixty dollars, you shall have the boy." Defendant said he thought the hire of the boy should be equal to

Columbia, November and December, 1857.

the interest, and Crouch said, "He has not been worth one cent to me." The substance of what Crouch had offered in this interview, he repeated next day in a letter to the defendant, dated September 26, 1857; Scurry testified that if Vincent was such as the physicians thought him, he would not have him, and that after lifting the log, (which he had seen at the log-rolling) Vincent could not, in his opinion, have walked with it.

"The case was fully argued, and all the testimony on either side was commented upon by counsel. The plaintiffs' counsel insisting that the breach of warranty had been shown to such extent as to authorize a verdict for the whole or the greater part of the price which the plaintiffs had paid; the defendants contending that no breach had been shown; that Vincent was sound at the sale, and his subsequent attack was either feigned, or was so slight that he had entirely recovered from it, or at any rate that disease, if any existed, had supervened the contract; that the want of flexibility in his joints, if any really existed, was the result of natural malformation, or of disease which had passed away and was no longer to be manifested by symptoms, and therefore was not unsoundness; that scrofulous taint, if that had produced enlargement of the ligaments, was predisposition, not formed disease; and that Vincent labored only under the misshapen ugliness common to many Africans.

"I submitted the facts to the jury, not attempting to state the testimony in detail, but referring to such parts as were most pertinent to the prominent questions that were raised. I adopted the definition of unsoundness which is given in *Stephens vs. Chappell*, 3 Stob. 84, as that is explained by that case itself; saying that the word *organic* is there inaptly used, for a formed disease, manifested by symptoms, and materially affecting the value, may be either organic or functional. I distinguished between predisposition and disease, and required symptoms to characterize the latter, but held that subsequent

Crouch vs. Galtbreath.

incidents and appearances might show that disease had existed at a previous time, although the symptoms had not then been observed. I instructed the jury that congenital malformation was not unsoundness, instancing club-foot, short-sightedness, deafness and other defects, about which I then doubted and now doubt; but I distinguished between mere malformation and disease, the latter of which might also be congenital, and as a criterion I suggested that disease grew worse, but mere malformation remained unchanged. I held that a permanent defect, materially affecting the value, which had resulted from disease, was unsoundness—was itself disease, although unaccompanied by pain, more especially when it was attended by a special liability to the return of paroxysms of disease, and that such result was in many instances an organic lesion, palpable to the senses, itself a symptom of the functional derangement which it necessarily produced. I submitted the questions of fact arising under these propositions, and I commented upon them only because they arose naturally from the testimony of Dr. Abney and the argument of the defendant's counsel. Touching the question of unsoundness at the sale, this case demanded notice only of chronic rheumatism in its various forms; but to illustrate the law involved in that question, so far as it depended upon Dr. Abney's alternative views, the distinctions between malformation and disease, between congenital misshapedness and congenital disease, between disease and the result of disease, between organic disease and functional disease, and between transient symptoms of irregular action and permanent visible alterations of the structure, were hastily glanced at; and, besides the instances mentioned, cases were in mind of congenital syphilis, congenital hernia before and after one strangulation, broken bones healed, dangerous bleeding at the nose, and other cases which any one that thinks of either of these distinctions, may imagine.

“The jury found for the plaintiffs \$200.”

Columbia, November and December, 1857.

The defendant appealed, and now moved this Court for a new trial, on the grounds:

1. Because, it is respectfully submitted, his Honor, the presiding Judge, erred in charging the jury that the law relative to unsoundness in a slave, is incorrectly stated in the case of *Stephens vs. Chappell*—that in the phrase “organic disease,” the word “organic” was improperly admitted; that disease may be functional as well as organic, and being functional it may constitute a case of unsoundness.

2. Because his Honor charged that the disease may have existed in the slave, although no symptoms may have been perceptible at the time of the sale, or previously to it.

3. Because his Honor charged that natural malformations, which grew worse, even after the sale, so as to impair the value of the slave, will constitute unsoundness.

4. Because his Honor, in commenting on the evidence of Dr. Abney, misled the jury in this particular. The said witness had testified that the negro slave in dispute, when examined by him, *was not laboring under any disease*, but was affected with the results of disease. His Honor charged the jury, that disease and the results of disease, were in effect the same—that results of disease only showed that the negro had been previously affected by disease.

5. Because his Honor, in charging the jury, commented favorably upon the evidence in favor of the plaintiffs, and wholly ignored the testimony of the defendant.

6. Because the verdict was clearly contrary to the law and the evidence; the defendant having established the fact by witnesses of unquestionable character, who had good oppor-

Crouch vs. Culbreath.

tunities of knowing the negro well, that up to the time of the sale, the said slave was perfectly sound and healthy, and that he entirely recovered to all appearance, from this temporary attack in January last, as described by plaintiffs' witnesses, and was engaged by the plaintiffs and others in the most laborious employments.

Moragne, for appellant.

Carroll, contra.

The opinion of the Court was delivered by

O'NEALL, J. In this case we perceive no reason to disturb the verdict. But it is thought advisable to make a slight explanation of the case of *Stephens vs. Chappell*, 3 Strob. 80.

That case, it will be seen on referring to it, placed the defence of the defendant upon the ground, that when he bought the woman, *she had the seeds of the disease, (typhoid fever,) in her system.*

It was of this disease, that the judge trying the case ruled that "such a thing as typhoid fever being considered like small-pox, as having a beginning before the symptoms are discovered, cannot be," and in which he stated the rule to be in such a case as ("typhoid fever,") that "the disease must be in a formed state evidenced by symptoms, before it could affect the sale."

This rule of course extends to all cases of fever having no fixed law for their commencement.

It never was intended to apply to chronic cases, such as rheumatism.

The word "organic" used by my much respected brother Evans, was inappropriate to the case; and the Court prefer to adhere to the precise ruling of the judge below, in that case.

Columbia, November and December, 1857.

It was *that*, and *that alone*, which this Court intended to affirm.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Barnes vs. Bell.

BARNES, BATEMAN AND RUDDEROW vs. JAMES M. BELL.

Practice—Right to appear and Plead at Second Term.

At the return term of the writ, the defendant moved to set aside the service, which motion the Circuit Judge granted; but, on appeal, his decision was reversed. At the next term, defendant moved for leave to appear and plead, and his motion was refused. On appeal, *held*, that defendant was not in default, and that he had the right, under the circumstances, to appear and plead at the second term.

BEFORE WITHERS, J., AT WILLIAMSBURG, FALL TERM,
1857.

The report of his Honor, the presiding Judge, is as follows:

"This case is on the enquiry docket: at the return term of the writ, the defendant moved to set it aside; motion was granted by the presiding Judge, and his judgment reversed by the Court of Appeals. At this term the defendant moves to appear and transfer; interrogatories were served for the plaintiffs on the defendant, and in *propria persona*; cross-interrogatories were handed to the plaintiffs' attorneys, and went with the commission, the plaintiffs' counsel giving notice to the attorney who put them in, that his appearance was resisted and would be. Afterwards interrogatories were filed for defendant, and plaintiffs' attorneys put in cross-interrogatories, and considering (as they say,) that their previous notice of resistance to the motion was understood, they did not then renew it. Under these circumstances the motion to appear and transfer the case, is refused."

The defendant appealed and now moved this Court to reverse the decision of the presiding Judge, and for leave to appear and transfer the case on the grounds:

Columbia, November and December, 1857.

1. That the service of the writ being set aside in the Court below, there was no case in that Court to which the defendant was required to appear.

2. That it would be improper for the defendant, having set aside the service of the writ, in the Court below, to have appeared to the said writ in that Court.

3. That the time at which the defendant was called on to appear, was the third Monday after the fourth Monday in March, and the notice required him to appear at a day when the Court was not in session.

4. Because the motion was at least addressed to the discretion of the Court, and should, under the circumstances, have been granted.

•

Dargan, for appellant, submitted that the service of the writ having been set aside by the order of the Court, to which it was returnable, the appellant was not bound to enter an appearance; and the Court of Appeals having reversed the order of the Circuit Judge, he should have been allowed to appear at the next term of the Court, and to plead to the declaration *ex debito justitiæ*; at all events, the motion was addressed to the sound discretion of the Court, and under the circumstances should have been granted. The appellant is not concluded by the Act of 1791, inasmuch as he appeared at the return of the writ, and the Court, by setting aside the service of the writ, judicially declared that there was no writ which he could appear to. The motion, in all essential particulars, is brought within the rule (established and recognised in sundry decisions of our own Courts, on the construction of the Act of Assembly, 1791,) by which a defendant is allowed to enter an appearance at the second term of the Court, where by mistake or misfortune, or the negligence of

Barnes vs. Ball.

his attorney, he has been prevented from doing so at the first term after the return of the process. In support of these positions, the following authorities were cited, and commented on: 7 Stat., Act of Assembly, 1791, Sec. 6, p. 263; *Davis vs. Miller*, Harp. 398; *Frean vs. Cruikshanks*, 3 McC. 84 and 91; *Williamson vs. Cummings*, 2 McC. 250; *Evans ads. Parr*, 1 McC. 283; *Hanks vs. Ingraham*, 2 Bail. 440.

No counsel appeared for the plaintiffs.

The opinion of the Court was delivered by

O'NEALL, J. In this case, we think the motion for leave to appear and plead, ought to have been granted. It is true, applications of this kind are addressed to the discretion of the Court, but it will be seen, in all the cases, that when the defendant has been guilty of no neglect, and has not intended to take an advantage, he has been allowed to appear and plead. Such is the case where an attorney has been employed and failed to appear, or where the act of God has prevented the appearance; or where the defendant was served by copy left at his residence, and he was absent from the State, and his absence extended beyond the term. In such a case as that last mentioned, the service was ruled to be good, but the defendant was let in to appear, and Judge Johnson, delivering the opinion said, "by the practice of the Court, the defendant would, on showing the circumstances, be allowed to come in and plead at any time before judgment, and even after judgment, the Court would, on merits shown, open the case and let the defendant into his defence, if he had not an opportunity of coming in before." *Frean ads. Cruikshanks*, 3 McC. 84.

Hanks vs. Ingram, 2 Bail. 440, is an illustration of the principle, that a defendant is not allowed to take an advantage of his own wrong. For there the defendant withheld

Columbia, November and December, 1857.

his motion to set aside the writ until the second term, when the statute would have protected him if he had succeeded in quashing the writ; having, however, failed in obtaining the advantage which he sought, he was not allowed to appear.

In this case, at the return term of the writ, the defendant moved to set aside the service. The judge sustained his motion, but on appeal to this Court, his decision was reversed. Under such circumstances, I think the defendant was guilty of no default. He was in Court by attorney, moving to set aside the writ at the return term. If the judge had refused his motion, he might and ought to have appeared, but the judge holding the service ill, he could not appear. When that decision was reversed, he must be considered as having all the rights, which he would have had, if that had been the decision below.

The motion is granted.

WARDLAW, GLOVER and MUNRO, JJ., concurred.

WITHERS, J. I acquiesce upon the special circumstances of this case.

Motion granted.

Binda vs. Benbow.

JOSEPH BINDA AND OTHERS vs. MOSES M. BENBOW.

Trespass to try Title—Estoppel—Trespass.

Where judgment for the defendant in a former action between the same parties, is relied upon, under the Act of 1744, (3 Stat. 612,) as a bar to a second action of trespass to try title, commenced more than two years after the first was dropped, it must appear with such certainty as the common law requires in cases of estoppel, (that is, "certainty to every intent,") that both actions were for the same land.

Where plaintiffs sued out their writ in trespass to try title, for "a certain plantation or tract of land of the plaintiffs, situate on the waters of Santee river," and then, without proceeding further, let fall their action, and judgment was entered for the defendant:—*Held*, that this judgment was no bar to a second action, brought more than two years afterwards, between the same parties and in the same district, for a "certain plantation and close of the plaintiffs," described generally as lying within the district, because it did not appear to the Court, that the two actions were for the same land.

Upon evidence, in trespass to try title, that defendant claimed the land as his own, and that his son, considering it his father's, entered, and occupied it with the knowledge of defendant and without objection from him, the jury found the defendant a trespasser, and, on appeal, their verdict was not disturbed.

Trespass to try title will lie against the landlord, though he never was in possession, the entry being by his tenant.

BEFORE WHITNER, J., AT CLARENDON, FALL TERM,
1857.

This was an action of trespass to try title. The writ was issued in Sumter District, to Fall Term, 1853, and described the land as "a certain plantation and close of the plaintiffs, situate, lying and being in the district and State aforesaid." The action was first tried in that district at Fall Term, 1855,

Columbia, November and December, 1857.

when a nonsuit was ordered, which, on appeal, was set aside. For a full understanding of the case see the report, 9 Rich. 15.

At this trial the plaintiffs confined their proof to the grant spoken of as the Sumter grant, to the land included within which they showed title. In proof of a trespass, they showed by their surveyor, that P. G. Benbow, a son of defendant, was in possession of a field within the lines of that grant, and also of a junior grant to one Bowman, under which the defendant claimed. They then called

P. G. Benbow, who testified, that in 1851, he cleared the field in question and had cultivated it ever since; worked his own hands; was then twenty-four years of age; was married the year after; defendant did not authorize him to take possession, but pointed out another place on the Bowman grant which he might clear and cultivate; witness preferred this place, and entered without consulting his father; acted entirely of his own head; considered the land his father's; in Spring of 1852, his father, for the first time, saw the clearing as he was passing by; said he did not know witness was at work there; made no objection.

L. B. Hanks, also testified, that at Fall Term of the Court for 1856, or at Spring Term, 1857, he had a conversation with defendant relative to the lands in dispute between him and plaintiffs; defendant spoke of the lands as his own; offered to sell them to witness; said he was anxious to sell, but had not been able to do so because of the law suit; had no doubt the decision would be in his favor.

For the defendant, the grant to Bowman was produced, and its location shown by a surveyor. This grant covered a portion of the land included within the lines of the Sumter grant, and most of the field cultivated by P. G. Benbow. Proceedings in equity for partition of the land granted to Bowman between his heirs, were also produced. Under these proceedings, the defendant, in 1840, became the purchaser of the land. The defendant also produced an exem-

Binda vs. Benbow.

plification of a writ in trespass to try title, issued by the plaintiffs in Sumter District, to Fall Term, 1840, against the defendant, who was therein called upon to answer to the plaintiffs, "of a plea, wherefore, with force and arms and so forth, in the district and State aforesaid, into a certain plantation or tract of land of them, the said plaintiffs, situate on the waters of Santee river, he broke and entered," &c., and of a judgment, as of Fall Term, 1841, entered in April, 1842, which, reciting that the plaintiffs "who brought the writ aforesaid, do not come, nor further prosecute their suit thereon," adjudged the plaintiffs to be in mercy, &c., and the defendant to go without day, and also that the defendant do recover against the plaintiffs his costs and charges, &c., and that he have execution therefor, &c. The defendant relied upon this judgment as a bar to the present action.

The case went to the jury, and his Honor instructed them, that as to the bar, the evidence furnished should show clearly that the two suits were not only between the same parties, but for the same land. If this was done, then, unless it appeared that the former suit had failed because there had been no trespass, or that a subsequent title had been acquired by plaintiffs, the objection would be fatal to their recovery. He thought, and said to the jury, that the evidence as to the identity of the land, as furnished by the proceedings, was too vague and uncertain. He was not satisfied that the trespass was shown to have been by the connivance, authority or sanction of the defendant, and was inclined to the opinion, that on this point the plaintiffs had failed. This question, however, being one of fact, he referred to the jury, who found a verdict for the plaintiffs.

The defendant appealed, and now moved this Court for a nonsuit, or new trial, on the grounds :

1. Because his Honor held and charged, that the plaintiffs

Columbia, November and December, 1857.

were not barred by the proceedings in the former suit between the same parties for the same land.

2. Because there was no proof of any trespass committed by the defendant, and therefore the verdict was without, and contrary to evidence.

3. Because Pinckney Benbow, the trespasser, being in possession, the plaintiffs (not having, and never having had possession,) cannot recover against the defendant (not being in possession) even if he had sanctioned the trespass, and therefore the verdict is contrary to law.

Bellinger, for appellant, cited *Henderson vs. Kenner*, 1 Rich. 474; Act of 1712, 2 Stat. 584. The proceedings in the first action are a bar, under the Act of 1744, to the second, more than two years having intervened between the termination of the first and the commencement of the second. This seems to be conceded, if the two actions were for the same land. It is said, however, that there is too much uncertainty in the description. This is no objection. Where the parties are the same, and the district is the same, it should be assumed that the land sued for is the same, and the onus should be on the plaintiffs to show the contrary. By any other rule, the Act, under our practice, which allows of very general terms of description in writs and declarations, will be almost a dead letter. It will be seldom, indeed, where a plat has not been made and returned to the Court, that a defendant will ever be able to avail himself of the bar of the statute. As to the trespass, he submitted, that none had been shown, and on that ground the verdict should be set aside.

J. S. G. Richardson, contra. It does not appear that the two actions were for the same land. The writ in the first action is in very general terms. The description is uncertain

Binda vs. Benbow.

and will apply to any land in Sumter District, on the waters of Santee river, which, in 1840, when the writ was issued, formed, with one of its two main branches, a boundary of the district for more than fifty miles. The doctrines of the common law relative to estoppels, would seem to be applicable to this case. In the notes to the *Duchess of Kingston's* case, 2 Smith, L. C. m., p. 438, it is said, that "the conclusive effect of a record is limited by certain rules and considerations," the fourth of which is, "where the allegation in the record is uncertain. For an estoppel, not being favored in the law, ought to be certain to every intent. Co. Lit. 352, b; 303, a. And therefore, 'if a thing be not directly and precisely alleged, it shall be no estoppel.' Co. Lit. 352, b." The record here cannot be said to come up, in any particular, to the requirements of this doctrine. Whether parol evidence would have been admissible to show what land was claimed by the first action, is more than questionable. It is enough, however, for this case to say, that no such evidence was offered, and that the writ itself does not show, what "plantation or tract of land" was claimed. The bar contended for in this case, that is to say, a bar founded upon a judgment of *nol. pros.*, or discontinuance, where the cause in which the judgment was entered, had not even proceeded so far as a declaration, is an anomaly in the law; it is founded upon the Act of 1744, P. L. 190, § Stat. 612, and is peculiar to our action of trespass to try title. No case has been found in our books where the action—the letting fall of which has been pleaded in bar—had proceeded no further than a writ; in all the reported cases declarations had been filed. Direct authority upon the point cannot be found in the English books; but there is a class of cases known to the common law, which bears a striking analogy to this, so much so, as at least to throw strong light upon it, if not to control it. It is that class of cases where a former suit pending, is pleaded in abatement of a second action for the same cause. The rule

Columbia, November and December, 1857.

there is, that in "writs which comprehend certainty, as debt, detinue, &c., the first shall abate the second." But in "writs which comprehend no certainty, as assize, trespass," &c.; "where no certainty is contained" there, before declaration filed, the first action cannot be pleaded in abatement of the second; *Sperry's* case, 5 Co. 61, and the reason is, "because it does not appear to the Court that it was for the same thing." Bac. Abr. Abatement. (M.) But it is said that the Court will assume that the two actions were for the recovery of the same land, and that the onus of showing the contrary is on the plaintiffs. This is novel and extraordinary doctrine, and one that certainly receives no countenance from those universally received principles of evidence which throw the burden of proof upon him who affirms—principles which would seem to be especially applicable to a defence which is not only "not favored in the law," but which is even denounced as "odious." No authority, however, has been adduced in support of the position, and it may well be allowed to pass.

Assuming now, for the purposes of the argument, and for those purposes only, that the two actions were for the same land, still it is contended, that the first is no bar to the second, under the principles ruled in *Henderson vs. Kenner*, cited by the counsel for the appellant; and that, for two reasons, first, because the defendant was no trespasser upon the land within the lines of the Sumter grant when the first action was brought, or at any time before; and second, because he was no trespasser when that action was dropped, or at any time within two years after. In this case the defendant denies that he has ever trespassed, and there is no proof of any trespass prior to 1851. It seems, therefore, fair to infer, that there was none prior to that time. Now, it would seem clear upon principle, that, where one brings trespass to try title, and fails in his suit because no trespass had been committed, the judgment, whether it be upon verdict,

Binda vs. Benbow.

nonsuit, or discontinuance, is no bar to a second action brought after trespass committed, for the very obvious reason that the question of title could not have been determined in the first action. It seems equally clear, that, as the policy of the Act of 1744, is, like that of the statute of limitations, to quiet the possession, the Act does not apply and bar the second action where the defendant is not in possession, or where he commits no trespass within the two years, sufficient to sustain the action. The case of *Henderson vs. Kenner*, appears to be based upon both these principles.

But it is said, that the plaintiffs, even if they have title which can be enforced, must fail in this action, because no trespass has been committed by defendant. Upon that point, it would seem to be enough to say, that the question is one of fact; there was testimony to go to the jury, and their verdict is conclusive. But, with deference to his Honor who tried the cause, it is submitted that the verdict was entirely right. The defendant claimed all the land included within the Bowman grant. His son desired to cultivate a field upon it, and the defendant pointed out a place which happened to be outside of the Sumter grant, which he might occupy. The son preferred this place, which turns out to be within the lines both of the Bowman and Sumter grants, and not doubting that his father would sanction the act, entered there. He held the place, not as his own, but as his father's. The defendant, a few months after, saw where his son had entered and taken possession, and made no objection; and from that time to this, though he continued to claim the land as his own, has never, except at the trial, repudiated the act of his son. This shows, not that he authorized it, but that he sanctioned and adopted it, not in words, but by his conduct. The son clearly considered himself, or at any rate acted as his father's tenant; and if his possession had continued for ten years, to whose benefit would it have inured? Besides, in this form of action, where

Columbia, November and December, 1857.

the defendant sets up title in himself, though some proof of trespass must be given, it is not required to be very strong. Indeed, so immaterial is this matter considered, that where a contest arises in the Court of Equity as to the title to land, and that Court orders an issue or action at law to determine the right, as it always does, it is the universal practice to require the defendant in the issue or action to admit ouster; and a similar rule in the Law Court might not be unwise.

The opinion of the Court was delivered by

WITHERS, J. An action, in the form of trespass to try title, was instituted by these plaintiffs against this defendant, by a *capias ad respondendum*, returnable to the Fall Term of the Court of Common Pleas for Sumter District, in the year 1840, whereby the defendant was required to answer wherefore, "into a certain plantation or tract of land of them the said plaintiffs, situate on the waters of Santee river, he broke and entered." At the Fall Term of the said Court, in 1841, this defendant entered up judgment against these plaintiffs, because "they do not come and further prosecute their suit," wherefore it was adjudged that the defendant have his costs, and execution for the same, and go without day, and so forth.

The writ in the present case was returnable to the Fall Term of 1853, is between the same parties, and is also an action of trespass to try title. It calls upon the defendant to answer, in the same Court aforesaid for Sumter District, wherefore, "a certain plantation and close of the plaintiffs, situate, lying and being in the District and State aforesaid, the defendant did break and enter," and so forth.

The plaintiffs let fall their first action aforesaid, about twelve years before the second one was instituted.

The first question raised is, whether the plaintiffs be not

Binda vs. Benbow.

barred of the present action, by force of the first section of the Act of 1744, 3 Stat. 612.

That section supersedes as well the common law rule, that ejectment might be maintained by successive actions *ad libitum*, as the qualification of that rule by the fourth paragraph of the Act of 1712, which made one unsuccessful action by a plaintiff "conclusive and definitive on the plaintiff's part forever." 2 Stat. 584.

The doctrine of estoppel by matter of record, is not strictly applicable to this case. The first action brought by these plaintiffs never reached an *issue*, there was no confession, no verdict, the action was let fall upon writ; and waiving the inquiry whether that can be called a record, the judgment entered up was merely that defendant have his costs and go without day. But it is not intended to deny that what a party had an opportunity to litigate before a Court of competent jurisdiction, and did not, is effectually concluded against him, *quoad hoc*. The question here must be resolved by the rule prescribed in the Act of 1744; for there was an action by these plaintiffs against this defendant, brought by way of claim to land, and in the form substituted in lieu of ejectment, and it was let fall more than two years before the present one was instituted. If the land was the same now claimed, the plaintiffs are "debarred and forever excluded of and from any further action or suit for the recovery of the said land."

The question, therefore, is reduced to this: is it the same land claimed in both actions? For it is too clear to admit of discussion, that the subject matter must be the same if the statute is to work a bar to the second action.

We have no evidence of identity except what has already been set forth, to wit., the claim was and is for land situate in Sumter District; in the first case described merely to be "on the waters of Santee river," and in the other as "situate, lying and being in the District and State aforesaid." How much

Columbia, November and December, 1857.

more of specific description may have appeared in the declaration in the present case, we are not informed, but however minute the description may have been, it could scarcely, in and of itself, have excluded the conclusion, that the first action may have been for a different parcel of land "situate on the waters of Santee river."

The doctrine as to estoppel by the common law, and in pleading may afford a good rule for this point, though the bar here seems not to have been pleaded. There must be, in estoppels, a certainty "to a certain intent in every particular," Coke Lit. 303, a.; "every estoppel, because it concludeth a man to allege the truth, must be certain to every intent, and not to be taken by argument or inference." *Ib.* 352, b. "It ought to be a precise affirmation of that which maketh the estoppel." *Ib.* One general form of expression when it may be said that an estoppel is not established, however that species of defence may be adduced, is, where the allegation in the record is uncertain. Surely, if we treat the first writ by these plaintiffs as the record, or as tantamount to such, for the purposes of this question, we may safely say the allegation is glaringly uncertain as to any precise parcel of land claimed to have been invaded, and totally devoid of any matter by which it can be identified, as the parcel of land now in question.

It is contended, however, that the presumption should be in favor of the identity of the cause of action in both cases, and the burthen to show the contrary upon the plaintiffs. No authority is cited for this, and the force of the argument seems to be opposed to it. Reliance is placed upon a former writ as a bar or a sort of estoppel, such as arises out of the Act of 1744. Suppose it to be regarded a record, and pleaded instead of being offered in evidence. The record would be judged by itself, no averment would be allowed against it, none to vary its import, if precise and certain. In such an attitude of the contest, the defendant would fail to maintain

Binda vs. Benbow.

the identity of the cause of action on the two occasions. If the same matter be offered in evidence, and it fails for the purpose, *proprio vigore*, it must be incumbent on him who pleads, or adduces as evidence on another issue, the same instrument, on him who affirms, to attach to the instrument held up as a bar or estoppel, that precision which is demanded and is indispensable to give it that effect. If that might be done under the lead of *Henderson vs. Kenner*, 1 Rich. 474, it is enough to say that it was neither done nor proposed to be done; for we do not learn from the report that any parol evidence was offered to give point and precision to the cause of action contained in the writ of 1840. The generality of complaint in a writ and of allegation in the declaration, usual in our actions of trespass to try title, may work the very difficulty which the defendant encounters in this case, if he be indeed disabled thereby to show what is true, but that is nothing to the purpose of the present question.

The second ground of appeal complains of the verdict, because there was no evidence of trespass by Moses M. Benbow, whatever may be true as to his son Pinckney. It was in evidence that Pinckney claimed nothing for himself, that he went upon land claimed by his father, the defendant, that the father knew the occupation by him of the *locus in quo*, and did not blame or forbid it, that he referred in general to this action, as interposing embarrassment to a sale of the lands to which he referred in the conversation with Hanks, and if the action embraced other parcels as well as the *locus in quo*, it was for the jury to say whether he meant to include also the latter, as being in contest between him and the plaintiffs. All this evidence was fit for the jury and for the jury only, and they have affirmed that it proved the defendant to be a trespasser. We cannot affirm that he was not, nor that there was no evidence he was; and the fact that if the continued adverse possession of Pinckney had ripened into a divestiture of the plaintiffs' title, it would have inured to the advantage

Columbia, November and December, 1857.

of the defendant, on the law of landlord and tenant, disinclines* to refrain from setting aside the verdict, although we see that the testimony to establish a trespass by the party sued was meagre.

What is just uttered may apply also to the third ground, if indeed that has not been settled by the former judgment in this case; vide. 9 Rich. 15. *Qui facit per alium facit per se*, teaches that if one authorizes a tortious act, as by illegally putting a tenant in possession of land, or instigating him to any other trespass, or confederates in the perpetration of it, he is responsible; and so he may be a trespasser by relation, that is by sanctioning a trespass committed for his benefit. It cannot be that a plaintiff would be obliged to sue alone the representative of another in unlawful possession of land to the exoneration of the principal, else it may happen that he would be confined to the pursuit of an irresponsible adversary, and visited with a barren judgment, while he who instigates and reaps the fruits, may rest secure. Among trespassers the plaintiff may elect whom he will sue, and he has done only this in the present instance.

The Act of 1744, does indeed look to the quieting of *possession* of land; but the possession of a tenant is that of his landlord, and the jury have found such to be the fact in this instance.

The motion is dismissed.

O'NEALL, WARDLAW, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

* Inclines us. Qu?

Godbold vs. Gordon.

ASA GODBOLD, ADMINISTRATOR OF HINDS, vs. ALFRED B. GORDON.

SAME PLAINTIFF vs. SAMUEL A. CAMPBELL.

Practice—Scire Facias.

Where plaintiff dies after interlocutory judgment founded on defendant's default to appear, and plaintiff's administrator issues *sci. fa.* on such interlocutory judgment, defendant is not entitled to an imparlance merely on entering an appearance to such *sci. fa.*, but will be allowed it only on sufficient cause shown.

It is not sufficient cause in such case to show that defendant denies plaintiff's representative character; such denial being founded on the objection that the ordinary, in the suit for letters, had not cited all in interest.

BEFORE WITHERS, J., AT MARION, FALL TERM, 1857.

The report of his Honor, the presiding Judge, is as follows:

"Hinds obtained judgment by default (interlocutory) against defendants: *scire facias* is issued against defendants, to show cause why plaintiff, as administrator, shall not have an assessment of his damages. The rule is returnable to this term, and defendants entered an appearance, and claim that this appearance puts the party to plead. One party shows for cause, that he "does not admit" that plaintiff is administrator. Plaintiff offers to produce the letters of administration by the ordinary. Cause was shown by one of these parties, that he wished to show that the plaintiff was not administrator, because the ordinary did not advertise according to law. I held that I could not look behind his official act, appointing the plaintiff administrator. *Held*, that no sufficient cause

Columbia, November and December, 1857.

being shown, the plaintiff is entitled to revive his judgment, and to have his damages assessed—and it is so ordered."

The defendant, Gordon, appealed on the ground :

That defendant having, at the return term of the writ of *scire facias*, entered an appearance thereto, the plaintiff was not entitled to the order, "to revive his judgment and to have his damages assessed," but should have been required to file his declaration, that defendant might show his cause by plea, and trial be had.

The defendant, Campbell, appealed on the same ground, and also on the further ground,

That the defendant, at the return term, showed cause by affidavit, and plaintiff should have been thereby put to his declaration in *scire facias*.

Inglis, for appellants, cited *Lanier vs. Smyth*, 2 Bail. 359 ; 7 Stat. 193 ; Tidd, 1117, 1127 ; *Gibbs vs. Wainwright*, 1 Bay, 476.

Evans, contra, cited 8 Bac. Abr. 598, *Sci. Fa.*

The opinion of the Court was delivered by

WITHERS, J.—The *scire facias*, in each of these cases, having been issued after interlocutory judgment obtained by the plaintiff's intestate against each of these defendants, and each of them having failed to appear to the original writ, the question is, whether entering appearance to the *scire facias*, worked an imparlance *ipso facto*, and put the plaintiff to declare. Though matter was submitted as to one of the two cases, it did not amount to cause shown, for it was said merely, that

Godbold vs. Gordon.

the party defendant did not admit that the plaintiff was administrator; and when interpreted, by statements at bar, the matter meant to be contested was, that the ordinary had not made due citation of all in interest, in the suit to obtain letters. It is clear that, the letters being produced, such matter could not be heard in any pleading that could arise between these parties, brought forth by future litigation in these causes. It would have been very different if an appeal, taken according to law from the Ordinary's judgment, had been pending.

No case has been discovered in the English books, or in our own, where the defendant resists a *scire facias* on a judgment interlocutory, founded on his default to appear to the action.

In *Gibbs vs. Wainwright*, 1 Bay, 476, the opinion reported discloses a case of *scire facias* on final judgment; *Lanier vs. Smith*, 2 Bail. 357, (5 MSS. 253,) presents a very brief report, but it was probably a *scire facias* to revive a final judgment, between the original parties, in which the defendant in the *scire facias* entered no appearance.

In the former case, it is distinctly ruled, that a defendant, brought in by *scire facias* is not entitled, as of right, either at common law or by any rule of Court, to an imparlance, by reason of entering an appearance, notwithstanding the practice to that effect was urged upon the Court. It was ruled, that on sufficient cause shown, the Court "will, if necessary, allow an imparlance, but never will, as a matter of course, in every case." In the latter case, the precise point was, whether judgment of revivor upon motion and order, the cause not appearing on the docket, and no entry made in the minutes, would be set aside, the defendant having entered no appearance to the *scire facias*. Judgment so pronounced was ruled to be valid, in such circumstances; and only a very general proposition, as to practice in general on *scire facias*, is announced by the Court, derived from Tidd.

Columbia, November and December, 1857.

Pursuing the stat. 8 & 9 Wm. 3, ch. 11, sec. 6, which was passed to prevent frivolous and vexatious suits, our legislation provides as follows: "If any plaintiff happen to die after interlocutory and before final judgment, the action shall not abate by reason thereof, if such action might be originally prosecuted by the executors or administrators of such plaintiff,"—"and his executors or administrators shall and may have a *scire facias* against the defendant, to show cause why damages in such action should not be assessed and recovered, and if such defendant shall appear, *at the return of such writ*, and not show, or *allege*, any matter sufficient to arrest final judgment,"—or shall make default, &c., "thereupon a writ of inquiry of damages shall be awarded, which being executed, judgment final shall be given for the plaintiff," &c., 7 Stat. 193.

This language scarcely leaves ground to doubt, that, in all the cases contemplated, some cause to arrest final judgment must be "*alleged*" at least, and that this must be done "at the return of the writ." To no case could the obvious import of the Act be applied more properly than to the present, where the defendants were in condition, if the plaintiff had lived, to make no defence, (having entered no appearance to the action,) except such as can be made for reduction of damages on a writ of inquiry—and where no imparlance, or postponement of the plaintiff could have been awarded. Ought his death to work such advantage to persons who, by default, admit the cause of action, and such injury to the estate of a deceased litigant? There can be but one answer, and that in the negative—and this answer is supported by a case of our own, long since decided and unreversed, as well as by the plain sense of the statute on the subject.

It is well settled that no matter can be pleaded to a *scire facias* which might have been set up as a defence to the original action, otherwise there would be no end of the proceedings; and after an interlocutory judgment against the defend-

Godbold vs. Gordon.

ant, his executor can plead only a release, or other matter in bar arising *puis darrien continuance*. Surely where the defendant himself survives, and is not in condition to file any plea at all, provided the plaintiff had lived, he ought to show, or "allege," when the process is issued merely to connect the plaintiff's representative with the record, something which has arisen *puis darrien continuance*, sufficient to "arrest the final judgment," or at the least to affect the amount of damages to be assessed and awarded. Without some strong reason or clear authority we ought not to visit the plaintiff here with what, for aught that appears, would be a merely vexatious delay, and that too without advancing at all any defence that the defendants could make at a subsequent term. Against this result a plaintiff's representative ought to be protected for the same reason that requires *scire facias* to be twice issued against a defendant's representative, who is brought in *pendente lite*, before he can be made chargeable to the action. Neither party to the cause ought to be placed in a better or worse situation by reason of the death of one or the other, after interlocutory judgment upon a cause of action that survives, on a case undefended especially.

Theoretical law is not violated by this decision. Granting that that may become an action where a plea is required or may be filed, yet a *scire facias* issued under circumstances such as exist here, is not in any proper sense, an action begun, though the process be returnable at a general return day, and require the party to appear. This is nothing but the continuation of an action pending, intended merely to substitute a privy in law in lieu of a deceased plaintiff, and is properly called a writ of execution. In one case, of the general class to which this belongs, the writ and declaration were called synonymous, and when a demurrer was filed to the *declaration* and the reply was that the *writ* was good and sufficient for execution, it was ruled sufficient, and that the declaration served only to conduct the writ upon the roll, *Blake vs. Dode-*

Columbia, November and December, 1857.

mead and wife, 2 Stra. 775. In another a *scire facias* disclosing the facts upon which it was founded and requiring an answer from the defendant, was said to be in the nature of a declaration: 2 Tidd, 1140 (8th ed.) *Vaughan vs. Floyd*, 1 Sid. 406. Our summary process is so regarded. In the present case it is difficult to conceive what a declaration could disclose which the writ does not, or what proper or useful end it would serve, when no ground of defence is disclosed.

There are many cases in which original actions are begun by this species of process—vide Tidd. Prac. 1139, (8th ed.) Proceedings to repeal letters patent, or revoke franchises are examples. In many others, proceedings in this form are in nature of original actions. In such cases the usual imparlance and proceedings to issue by accustomed pleadings may be very proper. But in cases such as are now before us, the mere entering of appearance, or showing insufficient cause, cannot work such consequences. The English Books consider a proceeding to revive an absolute or final judgment in the nature of an original action, because the plaintiff's attorney must have a new warrant and retainer to authorize him to sue out a *scire facias*, which is not so of a mere writ of execution—and a new right accrues to the plaintiff, on revivor, as to the presumption of payment from lapse of time, which would be reckoned from the entry of the judgment of revivor. But the first reason does not apply here at all, and neither would apply here, or in England, in such cases as these are.

The motions are dismissed.

O'NEALL, WARDLAW, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motions dismissed.
VOL. XI.—4

Geer vs. Brown.

THOMAS GEER vs. JEREMIAH BROWN, ET AL. COMMISSIONERS
OF ROADS.

Special Contract—Pleadings.

Plaintiff having failed to show performance of a special contract to build a bridge for defendants according to the specifications agreed on :—
Held, that he could not recover on the common counts for work, labor and materials—the defendant never having waived the special contract and having refused to accept the bridge.

BEFORE MUNRO, J., AT ANDERSON, FALL TERM, 1857.

This was an action of assumpsit for building a bridge for the defendants. The declaration contained several counts, one on a special contract, one on an award, and the common counts for work, labor and materials.

In July, 1856, the plaintiff contracted "to build or cause to be built" for the defendants, "a good and substantial bridge across Rocky River, at Trimmier's Mills, according to specifications herewith annexed, and have the same completed on or before the first day of October next;" for which the defendants were to pay him the sum of one hundred and seventy-nine dollars. The bridge was built by the plaintiff, but the proof was that it was defective in several particulars—some of the specifications had not been complied with, and it was not finished until about Christmas, 1856. The Commissioners refused to accept it, and had another bridge built some three hundred yards off.

The jury found for the plaintiff ninety-four dollars. The defendants appealed.

Wilkes, Reed, for appellants.

Harrison, contra.

Columbia, November and December, 1857.

The opinion of the Court was delivered by

O'NEALL, J. The plaintiff, as appears by the proof, failed to comply with the special contract, and of course he cannot recover upon that. The rule is stated in *Rye vs. Stubbs*, 1 Hill, 384, that "when a special contract is still open the plaintiff cannot proceed upon the general counts, but must declare upon the special contract." This being so, and the plaintiff having failed to show a performance, he cannot recover unless the special contract be in some way waived. It is supposed that was done by the alleged reference to arbitration. One of the Commissioners, Brown, did agree to refer the matter to Rice & Doyle, provided the other Commissioners would agree to it. On the way of Rice & Doyle to the bridge, Reid another of the Commissioners told them that he objected to any arbitration,—he stood he said upon the contract. This was an end of the arbitration.

The bridge it seems to me is a very unsafe structure, and the Commissioners certainly did right in refusing to accept it, and in building another. Still it may be that they would act wisely to pay the plaintiff the small sum found for him and thus end the litigation. For I understand from the argument here, that the timbers may be worth that much, and can be by the Commissioners usefully applied in other places. But that is a matter entirely within their discretion. For the plaintiff upon the facts before us has no legal claim upon the defendants.

The motion for a new trial is granted.

WARDLAW, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

Henderson vs. Bank.

THOMAS H. HENDERSON *vs.* THE PLANTERS' BANK OF
FAIRFIELD.*Mistake, Money paid by.*

H., the drawer of an accepted bill of exchange, payable at New Orleans, at thirty days, negotiated it to the bank. The bill having been protested for non-payment, H. paid the amount to the bank, but at that time the bill had been paid by the acceptor, (who had accepted for the accommodation of H.,) to the agent of the bank. This was then unknown, either to H., or the bank:—*Held*, that H. was entitled to recover from the bank the amount paid by him, as so much money paid by mistake—although the bank claimed the right to apply it to the account of the acceptor.

BEFORE O'NEALL, J., AT FAIRFIELD, FALL TERM, 1857

Assumpsit for money paid by mistake.

The plaintiff, on the 20th March, 1855, negotiated to the defendant at Winnsboro', a bill of exchange, drawn on, and accepted by John M. E. Sharp, for one thousand and twelve dollars and fifty cents, payable thirty days after date in New Orleans, and received the nett proceeds of the bill.

This bill of exchange, which had been accepted for the accommodation of the plaintiff, not being paid on presentation in New Orleans, was duly protested for non-payment, and notices thereof were forwarded by mail to the defendant and plaintiff. The protest bore date 21st April, 1855. Afterwards, to wit, on the 7th May, 1855, the plaintiff, at the request of the defendant, paid into the bank of defendant one thousand dollars, on account of said bill of exchange, and took a receipt for the amount, the bill

Columbia, November and December, 1857.

at that time being supposed, by defendant, to be in the hands of their agent in Mobile, Alabama. But the bill had been paid off, and taken up by John M. E. Sharp, in New Orleans, on the 26th of April, 1855. This fact of payment was unknown to the plaintiff, or the defendant, or its bank officers in Winnsboro', at the time the payment of one thousand dollars was made by the plaintiff to defendant, on 7th May, 1855.

The defendant had placed the amount paid by the plaintiff, (one thousand dollars,) to the credit of John M. E. Sharp, who was a customer, and had considerable dealings with the defendant's bank at Winnsboro'.

The plaintiff having possession of the bill of exchange, on the 17th January, 1856, endorsed an order on the receipt given to him by the defendant, directing the defendant to pay the amount (one thousand dollars) to P. M. Huson, which, on presentation and demand at the bank, was refused. John M. E. Sharp died intestate, in October, 1855, at Montgomery, Alabama, and John H. Pearson had taken out letters of administration on his estate, from the ordinary's office in Columbia, of this State.

"I thought," said his Honor, in his report, "the plaintiff was entitled to recover. The only point made by the defendant was, that the bank had applied the payment, by Sharp, of the protested bill, to his credit, and had furnished him with an account to that effect before his death, and before the protested bill was returned to Henderson.

"But of this there was no distinct proof. The circumstances relied upon were left to the jury. They found for the plaintiff."

The defendant appealed and now moved this Court for a new trial:

Henderson vs. Bank.

Because the refusal by Sharp to pay the bill at maturity, and notice thereof to Henderson, imposed upon Henderson the legal obligation to pay it as drawer, and payment by Sharp, *after protest*, and without notice to Henderson of such payment, was irregular, contrary to the usual and due course of business, and therefore at his own risk, and gave him no right of action against Henderson; his only remedy was against the bank.

Boylston, McCants, for appellant.

Bauskett, contra.

Curia, per O'NEALL, J. In this case the Court is satisfied with the verdict.

It is plain, that Henderson paid the money on a mistake in fact, induced by the defendant. For the bank, as appears by the receipt, told him that his draft was protested, and was in the hands of the bank's agent at Mobile, on the 7th May, 1855.

It was true, the draft had been protested for non-payment by the acceptor, but had been subsequently, to wit, on the 26th of April, 1855, paid and taken up by him. So that when the bank required payment by Henderson, it and he were alike mistaken, as the draft had been previously paid, and was not in the hands of the bank's agent at Mobile. It seems to me that this makes it plain, that Henderson was entitled to recover the money as paid by mistake.

That the draft was accepted by Sharp for the accommodation of Henderson, can make no difference. For on Sharp's payment, Henderson's liability to the bank of Fairfield, was ended. When he demanded the money from the bank, he presented the draft, and of course the bank could not pretend that they had any right to hold Henderson's money, when it

Columbia, November and December, 1857.

was paid by the acceptor, and the drawer had the possession of the bill.

Nor can it stand upon the position, that it had the right to apply Henderson's money to Sharp's acceptance: but it had been previously paid. Nothing remained but that the money should be refunded.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Harrison vs. Dodson.

A. W. HARRISON vs. A. M. DODSON, AND OTHERS.

Sum. Pro.—Practice—Answer—Evidence.

Where, in the process jurisdiction, the plaintiff uses the defendant's answer to interrogatories, he must rely upon that alone, and cannot resort to other evidence.

The rule also is, that if the defendant's answer charges him with a liability, he cannot discharge himself by his answer; but where many particulars enter into the answer to show the liability, the rule does not apply; and the whole must be taken, although facts are stated, showing the defendant's non-liability.

BEFORE MUNRO, J., AT ABBEVILLE, FALL TERM, 1857.

The report of his Honor, the presiding Judge, is as follows:

"This was an action upon an account for soap, inks, perfumery, &c., sold by the plaintiff, a merchant in Philadelphia, to the defendants, residents and merchants in Abbeville District.

"The plaintiff served the defendants with interrogatories to be answered on oath. One of the defendants only, A. M. Dodson, answered. In his answers, he stated, that the defendants were partners in trade, and the business of the firm was managed by himself. That in January, 1857, an agent of A. W. Harrison called at the store and urged him to order a bill of goods, and if the goods ordered did not suit when they came, he could return them. That he did order the bill of goods with which he was charged.

"The goods were received but did not suit him, and after taking from the box as many as amounted to ten dollars and forty-eight cents, he sent the remainder back.

Columbia, November and December, 1857.

"The plaintiff objected to parts of the answers, because they were not responsive to the interrogatories. The plaintiff then offered to prove the original orders of A. M. Dodson & Co., to A. W. Harrison of Philadelphia. The defendants objected to other proof than the answers to the interrogatories. I overruled the objection, and the original orders were proved. The orders were dated 20th December, 1856, and signed by A. M. Dodson & Co. Above the signatures were printed terms as follows: "Net cash, allowing *usual* time for arrival of goods; the draft for the amount is drawn on the day of shipment. Boxes and drayage *free of cost*. Freight by packet lines running direct from Philadelphia to prominent ports on the Atlantic and Gulf of Mexico, I deduct from the invoice, and I insure to all such ports at my own cost. All subsequent freight and insurance by water or land, is at the cost of the purchaser. No package is permitted to leave the factory but in perfect order to transport safely to any part of the country. *The goods become the property of the purchaser when they leave the manufactory*, therefore, for all loss or damage by breakage or otherwise, not covered by insurance, and for all delays in transportation, he must look to the transporters of the goods, who *alone* are legally responsible to the *owner* for prompt and safe delivery." Below was the order given by A. M. Dodson & Co., in words as follows: "You will forward the above by steamer, to care railroad agent in Charleston, thence by railroad to Donaldsville, and draw for the amount of the bill at days from shipment of the goods, payable through. We will remit draft."

"The defendants then offered witness, Wyatt Norwood, who stated that he was present at a conversation between an agent (as he was informed) of A. W. Harrison and A. M. Dodson, at the store of the latter, some time in January, 1857. That agent requested Dodson to order a bill of goods, and said to him, if the goods ordered did not suit,

Harrison vs. Dodson.

he could return them. The agent had with him papers with printed lists of articles, similar to the orders offered by the plaintiff. That the articles desired were marked, and the order signed by A. M. Dodson—the articles marked were the same as those in the account sued on. I held the testimony of witness Norwood to be incompetent, because of its tendency to contradict the written or printed agreement. The answers to the interrogatories, so far as they were responsive, were received, and proved the ordering and receipt of the goods charged. There was no proof of the return of the goods, and the original orders having been proved by other testimony, I decreed for the plaintiff the amount of his account, after deducting the ten dollars and forty-eight cents, which had been paid."

The defendant appealed on the grounds:

1. Because, the plaintiff required the defendant to answer on oath certain interrogatories, and after using the information thus obtained, was allowed to offer other evidence of his claim.

2. Because, the answers to the interrogatories were read by the desire of the plaintiff's counsel, and the plaintiff's claim should have been decided by the discovery thus obtained, and no other evidence.

3. Because, the plaintiff failed to make out his case, either by the *answers to the interrogatories* or by the *other proof*, which standing alone was sufficient.

4. Because, the defendants sent back the articles according to the special agreement, made with plaintiff's agent, and should not have been required to pay for them.

Columbia, November and December, 1857.

Copy Interrogatories.

1. Examine the account hereto attached, and say whether or not the articles mentioned therein, were ordered by you, or by some one of you, for the firm of A. M. Dodson & Co., from plaintiff, Apollos W. Harrison? If not all the articles in said account, please state what articles therein were ordered by you, or some one of you, from the said plaintiff?

2. Did you, or did you not, or did some one of you receive the articles mentioned in said account from plaintiff?

Copy Answers.

1. This defendant and Jane Kirkpatrick, widow, now Jane Taylor, were partners in merchandize, in January, 1857. This defendant did the whole business, and Mrs. Taylor knew nothing of ordering or buying goods. This defendant was urged, in January last, by the agent of A. W. Harrison, to order a bill of goods; and was promised and assured by the said agent that he might order a list of articles, and if they did not suit when they came, to box them up and send them back. This assurance and agreement can be proved. Upon the faith of this agreement made by the agent of plaintiff, (through whom alone this defendant knew Harrison,) this defendant did order, conditionally, the list of goods charged. When the goods came they did not suit; but as the box was opened, this defendant took as many of them as amounted to ten dollars and forty-eight cents, and sent the remainder back as per agreement with the agent of Apollos W. Harrison. The ten dollars and forty-eight cents has been paid by the defendant, and he owes A. W. Harrison nothing, nor does the firm owe him anything.

2. The articles were received, and most of them were sent back as before stated.

Harrison vs. Dodson.

McGowan, for appellant, cited *Hare on Discov.* 19; 2 Rich. 367; 7 Cranch, 69. The plaintiff having obtained and used a discovery, is restricted to that. *Brown vs. Stroud*, 8 Rich. 292. If other testimony was admissible, then the defendant's answer and Norwood's testimony prove the defendant's case. 2 Bail. 392; *McCaw vs. Blewett*, 2 McC. Ch. 102; 4 Phil. Ev., by C. & H. 600; 2 N. & McC. 455; 8 Wend 116; 2 Hill, 353; 3 St. & Port. 322.

Livingston, contra, cited, 1 Strob. 333; *Riley*, 264; 2 Rich. 367; *Walker vs. Berry*, 8 Rich. 33; 2 Bail. 391.

The opinion of the Court was delivered by

O'NEALL, J In this case, I think the plaintiff, after examining the defendant upon his whole case, had no right to introduce other testimony. The true rule is stated in *Brown vs. Stroud*, 8 Rich. 292. In that case it is stated: "when he" (the plaintiff) "desires the benefit of the defendant's oath, and examines him by interrogatories, he stands as a complainant in equity; having sought and obtained, or failed to get a discovery, the defendant's statement *cannot be controverted*." For in such a case (a sum. pro.) the defendant may be examined, because the plaintiff chooses to say, I have no other proof. This makes the case exactly analogous to the bill for discovery, as ancillary to another suit.

There is no doubt about the rule in the process jurisdiction, that if the defendant's answer charges him with a liability, he cannot discharge himself by his answer, as if he admits he purchased goods, he cannot say I paid for them. *Walker vs. Berry*, 8 Rich. 33, decided upon the authority of *Clark vs. Meek*, 2 Bail. 391.

But if, as here, many particulars enter into the answer to the interrogatory to show the liability, or non-liability of the defendant, then, I think, it does not fall within the rule stated

Columbia, November and December, 1857.

and the whole answer must be taken. It is true, the plaintiff may decline to use the answers, and resort to other proof.

A new trial is therefore ordered.

WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

New trial ordered.

Landrum vs. Hatcher.

B. F. LANDRUM vs. BARTLETT W. HATCHER.

Trespass to try Title—Lands contracted for after will made, to whom they go—Sheriff's deed void, no estoppel.

Lands bid off at sheriff's sale after the purchaser has made his will, go, not to the legatee or devisee, but to the heir-at-law, to whom the sheriff's deed should be made. This is the rule, although the executor may be compelled to pay the purchase money out of the bequeathed personal estate.

A defendant in execution whose land has been sold at sheriff's sale, may show that the sheriff's deed is void, because made not to the purchaser or his representative, but to one who had no right to it.

BEFORE WARDLAW, J., AT EDGEFIELD, FALL TERM,
1857.

The report of his Honor, the presiding Judge, is as follows:

"Trespass to try titles.

"The plaintiff showed judgments and writs of *fi. fa.* against the defendant, had in 1834, a sale of the land in question by sheriff, O. Towles, in June, 1835, to Christian Breithaupt for one hundred and seventy-five dollars, and possession of the land by the defendant in 1834, and ever since.

"Further the plaintiff showed, the will of Christian Breithaupt, dated December 5th, 1831. By this, the residue of his estate is directed to be sold, and the proceeds to be remitted to Germany, there to be distributed amongst certain alien kinsman:—

"The death of Christain Breithaupt in 1836, and probate of his will granted to John Bauskett, the only executor, of several appointed, that became qualified:—

Columbia, November and December, 1857.

"A paper, signed by John Bauskett, dated December 11, 1850, directed to S. Christie, sheriff, reciting the sale of this land to Christian Breithaupt, the payment of the purchase money to O. Towles, sheriff, by Bauskett, and Bauskett's omission to take titles; and instructing Christie to make the titles to Trumond Breithaupt, or to his order, "he (as there said) being entitled to said land as attorney in fact of the residuary legatees of the said Christian Breithaupt deceased :"—

"Proof that Trumond Breithaupt was agent for the German legatees of Christian Breithaupt, and a sheriff's deed, made December 18, 1850, by S. Christie, sheriff and successor of O. Towles, to the plaintiff—according to Bauskett's order, and by the direction and with the assistance of Trumond Breithaupt.

"After argument, I ordered a non-suit. Christian Breithaupt's equitable interest in this land, acquired after the making of his will, did not I thought pass under the will,—neither Trumond Breithaupt, nor any of the persons whom he represented was an heir of Christian Breithaupt:—John Bauskett as executor had no power over this land and the conveyance made by sheriff Christie to the plaintiff was like every deed made by a sheriff to one who is neither purchaser nor assignee of a purchaser, beyond the power which a *fi. fa.* confers on a sheriff."

The plaintiff appealed and now moved this Court to set aside the non-suit and for a new trial, on the grounds:

1. Because his Honor erred in ruling that this was not such an interest in land as could pass under the will of Christian Breithaupt, deceased.

2. Because his Honor erred in ruling that the defendant was entitled to a non-suit, when it was shown that the plain-

Landrum vs. Hatcher.

tiff held under defendant's own deed made by the sheriff as his agent.

3. Because his Honor should have ruled that defendant had no right to dispute the title of the sheriff which was the deed of defendant.

Bauskett, for appellant, cited Act 1803, 5 Stat. 457; *McElmurray vs. Ardis*, 3 Strob. 212. Though after purchased lands do not pass under the will, yet where there is no actual purchase but only a contract to purchase, which the testator leaves incomplete—still *in fieri*—it would seem nothing but right, that the legatee out of whose funds the purchase money is paid, should have the land—especially where the executor upon paying the purchase money, or a balance due, directs the title to be made to him, and it is made accordingly. That is substantially the case here. At any rate is not the defendant in execution estopped? Can he show that the deed was made to a wrong party—to one not entitled to it? and that it is therefore void.

Carroll, contra. After acquired lands do not go to the devisee; and it is well settled that lands contracted to be purchased are considered as purchased. The money is to be paid out of the personal estate by the executor, and the heir—not the legatee or devisee—is the one who alone can demand the titles. 5 Stat. 163; 1 Jarm. on Wills, 42; 2 Wms. Ex'ors, 1251; 2 Story Eq. § 1212; Chit. on Con. 308; 10 Bing. 533. It is the duty of the executor to pay the debt out of the fund provided by law, or the will of the testator, for that purpose, and when he has discharged that duty his office is at an end. He cannot control the law and direct the deed to be made to the legatees or devisees or their agent. Nor has the sheriff any such right. He is the agent of the defendant in execution to make the deed to the purchaser or

Columbia, November and December, 1857.

to one rightfully claiming under him; but he is not his agent to make it to any one to whom he may please to make it. If he makes it to a wrong person it is simply void, and the defendant is not bound.

The opinion of the Court was delivered by

WHITNER, J. This Court is of opinion the non-suit was properly ordered by the circuit Judge. The views suggested in the report are such as meet with approval, and in delivering the judgment of this Court, I shall only attempt briefly to enforce and sustain them by authority. By our Act of 1791, lands acquired after making a will, do not pass thereby, unless there has been a subsequent republication. 7 Stat. 163. It is conceded, therefore, that if a deed had been executed by the sheriff to Christian Breithaupt, neither his executor nor devisee could have maintained this action. The Act of Assembly, 1791, embraced both lands and personal estate, though by the Act of Assembly, 1808, this restriction as to personalty was removed, and upon this branch of the case the inquiry is as to which class the interest of Breithaupt in these lands belonged. It is correctly denominated by the circuit Judge an equitable interest. Mr. Story in his Eq. Jur. Section 1212, says, this belongs to a class of cases embracing what is commonly called the equitable conversion of property. By this is meant an implied or equitable change of property from real to personal or from personal to real, so that each is considered transferable, transmissible and descendible, according to its new character. Thus, says the author in continuation, where a contract is made for the sale of land, the vendor is in equity immediately deemed a trustee for the vendee of the real estate, and the vendee is deemed a trustee for the vendor of the purchase money. Under such circumstances, the vendee is treated as

Landrum vs. Hatcher.

the owner of the land and it is *devisable* and descendible as his real estate.

The equitable interest therefore in question if it had been acquired before the will was made would have passed by the devise, but being acquired after, and there being no republication, descended to the heir. The general rule as stated in Chit. on Con. 308, is that the heir or devisee, and not the personal representative, must sue on a contract relating to freehold property. In such a contract as this a specific performance must have been asked by the heir-at-law.

It is supposed that the payment of a portion of the purchase money by the executor may make a difference, but it is not perceived. If the purchaser of real estate dies without having paid the purchase money, his heir-at-law or devisee of the land purchased, as the case may be, will be entitled to have the land paid for by the administrator or executor—2 Will. on Ex'ors. 1499; 10 Ves. 597. In this case, therefore, Christian Breithaupt, having died intestate as to the land, the heir-at-law to whom it descended, was entitled to have it discharged of the debt, and to have a title deed from the sheriff. But it is insisted that the sheriff has actually made a deed to the land in question, and the defendant cannot gainsay or dispute this title. But whose title may he not dispute, and why not? The purchaser or any one claiming under him, and because such person is regarded as having the title of the defendant himself, and that he may not dispute however imperfect.

It has never been held that he may not resist a stranger. This plaintiff is neither the purchaser from, nor assignee, devisee or heir-at-law of Breithaupt. He has a sheriff's deed; but by what authority? It is said the sheriff was the agent of the defendant, but is this correct for any such purpose? The sheriff may be by law and for certain purposes the agent of both plaintiff and defendant. That is an agency well defined, and as to this transaction the Act of the

Columbia, November and December, 1857.

Legislature must be pursued. The sheriff is authorized to convey to the purchaser, and, looking to the object of the law, our Courts have recognized conveyances to his assignee, devisee or heir.

The alleged authority from the executor cannot mend the matter, as this has been to be shown a case of partial intestacy. It is not analogous to the case of *McElmurray vs. Ardis*, 3 Strob. 212. In that case there was a will before the interest accrued, and whilst the judge delivering the opinion held that generally the titles should be executed to the party having the legal estate, adds but if made to the devisee the land was subject to a trust confided to the executor for the payment of debts. The motion to set aside the non-suit and to grant a new trial is refused.

O'NEALL, WARDLAW, WITHERS, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Conyers vs. Rhame.

JOHN J. CONYERS vs. JOHN C. RHAME.

Voluntary Escape—Sheriff—Forged Bail Bond.

Where a sheriff having a debtor under arrest on bail process discharges him on a bail bond which proves to be a forgery as to the signature of the bail, such discharge is a voluntary escape, although the sheriff was ignorant, at the time of the discharge, of the forgery.

BEFORE WITHERS, J., AT SUMTER, EXTRA, JUNE TERM,
1857.

The report of his Honor, the presiding Judge, is as follows:

"The defendant had been sheriff, and was sued by the plaintiff, in case, for the *voluntary* escape of one Ellerbe H. Jones, sued by this plaintiff, his bail process being issued upon a promissory note for nine hundred dollars.

"His writ was lodged 21st October, 1854, and was regular as bail process. A return was endorsed upon it, of the same date, signed by the defendant, as follows: "Arrested E. H. Jones, and he gave W. B. Jennings for his bail." The paper which the defendant received as a bail bond had the form of one, was partially filled up (that is the blanks of it) by Eveleigh, the deputy or clerk of Rhame; had October, 1854, inserted as a date, but not the day of that month; purported to be executed by Jones and W. B. Jennings; but it turned out, ultimately, that the name of W. B. Jennings was discovered to be a forgery, as well as the name of J. C. Stafford, which was subscribed to the note given by Jones to Conyers. Rhame returned the writ regularly, *i. e.* to the Fall Term of 1854, with the endorsement above stated on it; and he had discharged Jones, upon the receipt of the paper above described as a bail bond.

Columbia, November and December, 1857.

"After the Spring Term of 1855, Rhame having discovered the forgery of Jennings' name, and the forgery of Stafford's being then likewise generally understood, applied to the attorney of Conyers for the bail writ. The attorney, knowing (he said) well enough that Rhame wanted to use it to get himself, if he could, "out of the scrape," let him have the writ; without a word, however, of understanding or agreement between them, he, (the attorney,) being well inclined to let Rhame do the best he could, though he would in no degree compromise the rights of his client. He took the precaution to endorse Rhame's return of October 21st, 1854, on the declaration, and take Rhame's signature thereto.

"Rhame, through Bateman, deputy, having stricken out the first return, made the following on the writ: 'Arrested E. H. Jones, and committed him to jail, 5th May, 1855;' and he added this: 'The defendant was arrested 1st October, 1854, and delivered on a bond signed W. B. Jennings, but the bond proved to be false,' which was subscribed by Rhame, as sheriff.

"Jones applied for the benefit of the prison bounds Act on the 10th May, 1855, rendered in schedule only a portmanteau and wearing apparel, and was discharged 19th May, same year. The plaintiff prosecuted his case against Jones, had judgment signed 4th December, 1855; lodged *fi. fa.* and *ca. sa.* same day, neither of which produced any fruit, for Jones had long departed. He brought *this* action on the 17th March, 1856.

"This was the case which the plaintiff, Conyers, insisted was a *voluntary* escape, and the defendant, Rhame, a *negligent* one.

"I held this: That whatever indulgence a sheriff might allow his prisoner, on civil process lodged for bail, *before* the return of that process, if, *after* that return, he could produce neither the body nor a bail bond, there was an escape, in other words, an unlawful enlargement from custody; if the

Conyers vs. Rhame.

sheriff consented to, or connived at, such enlargement, it was a voluntary consent to an unlawful enlargement; and that being an *escape*, it could be nothing less than a voluntary escape, and that on the part of him who consented to it, or connived at it. That Rhame was exceedingly careless and negligent in receiving from Jones a basely fraudulent paper for a bail bond, did not make his consent to his enlargement less voluntary; and, such an act being an escape, the gross negligence that may have deluded Rhame into authorizing it, positively enacting it, could not make it the less, but the more a voluntary escape. I held such doctrine after pretty full argument, on the one side and the other. It should be regarded as a decision by the Court, and the jury left no latitude, for I treated the spurious paper received by Rhame as a bail bond, to be of no virtue beyond a mere blank. (It ought, perhaps, to be taken into the case, as a fact, that Jennings was amply good for the debt of Conyers, if he had in fact signed the paper.)

"A question remained, which I left to the uninfluenced judgment of the jury; that is to say, whether the plaintiff, through the re-delivery of the writ to Rhame authorized the re-capture of Jones, in which case I instructed them that the voluntary escape, the cause of this action, was waived by Conyers, and he could not recover, for he had sued purely for a *voluntary* escape. The jury saw nothing in this inquiry to help Rhame, for they rendered a verdict against him for the former recovery against Jones and the cost, to wit: one thousand one hundred and nineteen dollars and thirty-one cents."

The defendant appealed and now moved this Court for a new trial on the grounds:

1. Because his Honor charged that the defendant was guilty of a voluntary escape, whereas that question ought to

Columbia, November and December, 1857.

have been left to the jury—or if it be a question of law, the jury ought to have been told that it was a negligent escape.

2. Because the verdict is contrary to the law and facts in this, that the facts showed that it was a negligent escape, and therefore the defendant was only liable for the actual loss (beyond costs) which actual loss was nothing.

3. Because the re-capture of Jones (the original defendant,) and his discharge constituted a sufficient defence.

Bellinger, for the appellant. It is a case of negligent, and not of voluntary escape, and his Honor should so have instructed the jury. The negligence may have been gross, but still there was nothing but negligence, and that consisted in taking a forged bail bond. In that was the wrong and not in the discharge, for he had the right to discharge if he took a bond, even though it should turn out to be insufficient. At any rate the question was one of fact and should have been left to the jury. In a case of escape the intent, with which the act was done, is a material inquiry, and that can only be determined by a jury. He cited Act of 1712, 2 Stat. 554; Act 1839, 11 Stat. 31; Act Congress, 1st Session, Ch. 60; 1 Tom. L. Dic. Escape; Com. Dig. Escape; Webster's Dic. Escape; 2 Esp. N. P. 238; 1 Russ. on Cr. 419; 2 Blac. Com. 281; 3 Black. Com. 416; 4 Black. Com. 130, 191; Grimke, Justice, 157, 216; *Brisac vs. Moore*, Dud. 231; *State vs. Arthur*, 1 McM. 457; *State vs. Halford*, 6 Rich. 58; *Cook vs. Irvine*, 4 Strob. 206; *Palmer vs. Hatch*, 9 Johns. R. 329; *Holmes vs. Lansing*, 3 Johns. Cas. 73; *Jansen vs. Hilton*, 10 Johns. R. 549; *Barry vs. Mandell*, 10 Johns. R. 563; 2 Coke, R. 120; 6 Taunt. 325, 490; 12 Mass. R. 319; 1 N. Hamp. R. 100; 1 Root, 106; 2 Con. R. 473; 10 Johns. R. 220; Minor, 260.

Conyers vs. Rhame.

Spain, Richardson, contra. The authorities cited from the books on criminal law have little application. Where the proceeding is by indictment for an escape, there the intent is material, and it must be shown that the sheriff consented to an unlawful enlargement knowing it to be unlawful. In a civil action, it is enough to show, that the enlargement was by consent and that it was unlawful. In cases like the one before the Court, where the debtor may demand his discharge upon giving bond, the distinction would seem to be this: If the sheriff takes a valid bail bond, then there is no escape, even though there be an irregularity or defect, as, in this case, if there be no subscribing witness, or if the day of the month be not inserted in the bond. In such case if the plaintiff sustains damage by reason of such irregularity or defect he must sue specially for that. So if the bail should prove to be insufficient, the action must be for taking insufficient bail, and not for an escape. But if the sheriff discharges without taking bail at all, or, what is the same thing, if the bond should be void, then there is an escape, and that is necessarily voluntary because the sheriff consents to it. In this case the name of the bail was forged and Jones alone signed the bond. Now if one can be his own bail—if Jones can be bail for Jones—then there was a valid bail bond; otherwise there was none, and the discharge being without bond was a voluntary escape. The error of the counsel for the appellant consists in this: He confounds the negligence in taking a forged bail bond, for which unquestionably an action lies, and for which there is a count in the declaration, with the escape, which is a different thing, and for which an action also lies. And again, he assumes that it is necessary, in a civil action, to show a criminal intent, as if the proceeding were by indictment. Now if the defendant were under indictment for an exactly similar offence, the evidence might not be sufficient to convict him, not because the escape was not voluntary, but because in indictments for a voluntary

Columbia, November and December, 1857.

escape, a criminal intent must be shown. They cited *Bac. Abr. Escape*; *White vs. Jones*, 5 East, 292; Act 1839, 11 Stat. 31, 82; *Bonafous vs. Walker*, 2 T. R. 126; *Smith vs. Hart*, 1 Brev. 146; 3 Blac. Com. 415; 2 Phil. Ev. 399; *Adams vs. Turrentine*, 8 Ired. 152; *Mabry vs. Turrentine*, 8 Ired. 201; *Brissac vs. Moorer*, Dud. 228; *Cook vs. Irving*, 4 Strob. 204; *State vs. Halford*, 6 Rich. 58. But the verdict may stand even if the escape was negligent, for it is well settled that under a count for a voluntary escape a negligent one may be shown; *Bonafous vs. Walker*. But the escape was voluntary and in such case there can be no subsequent arrest unless the plaintiff directs it. 2 Esp. N. P. 611; *Lansing vs. Fleet*, 2 Johns. Cases, 13; *Scott vs. Peacock*, Salk. 271.

The opinion of the Court was delivered by

O'NEALL, J. I concur fully in the ruling of the judge below. The defendant had neither the body nor the bail bond of the defendant at the return term of the writ. *Cook vs. Irving*, 4 Strob. 204. *This was an escape*: and that it was voluntary, was conclusively shown by the fact, that the prisoner was out of his custody by his assent. When these facts were proved, it was the duty of the judge to tell the jury, as he did, that it was a *voluntary escape*. If he had left the facts to the jury, and they had found, as for a negligent escape, we would have set the verdict aside on the motion of the plaintiff, as palpably against the evidence. I therefore conclude, that the defendant can take nothing by his motion; which is dismissed.

Motion dismissed.

WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Conyers vs. Rhame.

WARDLAW, J., *dissenting*. I cannot overcome the impression that the idea of assent or connivance is necessarily involved in the complex idea of voluntary escape: and the assent or connivance, it seems to me, must be not to the mere enlargement of the prisoner, but to his unlawful enlargement. Did the defendant know that the bond which he received was forged? Perhaps his negligence was so great that his knowledge, or something equivalent to it, might have been discovered in evidence of all the circumstances. But I distinguish between ignorance of law and ignorance of fact, and I think it should have been left to the jury to decide the question whether the escape was voluntary. No fixed rule or general principle enabled a judge himself to draw from the evidence of the circumstances, the ultimate conclusion on this question of fact.

Motion dismissed.

Columbia, November and December, 1857.

TIMOTHY W. BERRY, BY NEXT FRIEND, *vs.* BATSON JOURDAN.

Evidence—Proof of contents of lost deed—Refreshing memory.

What is sufficient proof of loss of an original deed in order that secondary evidence of its contents may be given.

A witness may, it seems, be allowed to refresh his memory as to the contents of a paper, by reading that which purports to be a copy, though it was not made by himself, provided that after reading it, he can speak to the facts from his own recollection.

A witness who had heard a deed read nineteen or twenty years before the trial, and had not seen it or a copy since, swore to the contents, (the deed having been lost,) and his testimony was strongly corroborated by other evidence in the cause : *Held*, that this was sufficient evidence to sustain a verdict supporting the deed.

BEFORE WITHERS, J., AT DARLINGTON, FALL TERM,
1858.

The report of his Honor, the presiding Judge, is as follows :

“ This action was in trover, and was brought for the value and hire of six negroes, viz : Rhina, Peter, Prince, Isaac, Tom and Dick. The four last were the children of Rhina.

“ The claim of the plaintiff, a minor of sixteen or seventeen, was founded upon a deed alleged to have been executed by his grandfather, one Richard Allen, to his mother, the only child of Allen by his first marriage, whereby a life estate was given to the mother, and the remainder to the plaintiff.

“ The plaintiff undertook to establish the existence and loss of the original deed.

“ Seaborn Berry, plaintiff's father, was examined as a

Berry vs. Jourdan.

witness. He testified that he had left this district about the year 1841, and went to Alabama, and had heretofore been back but once on a visit. That he once had a deed executed by Richard Allen, which conveyed Peter, Rhina and Phillis, and their increase; that when he went off, he left it in the hands of either the defendant, Jourdan, or of his attorneys at law, Messrs G. W. & J. A. Dargan; that it was not among his papers; that he had examined them for it; (he said this on the direct examination, but on the cross-examination he would not affirm he had examined specially for the paper, but he affirmed that he had but very few papers, and he knew it was not among them, and he had it not); that the deed was from Richard Allen to his daughter Mary Jane, whom he had married, who had died a good many years ago, as he understood; that he did not see it executed; that he knew he had not taken it away with him; that he had left papers with the defendant, papers to be handed to his grandmother, Dolly Zilks; (he specified only a note for five hundred dollars, made by the defendant in his favor, for part purchase money of these same negroes, sold by him to defendant); that there were other papers left with defendant, which he could not specify; that Mrs. Kennedy, at her own house, some ten days before he married Mary Jane Allen, she and her father Richard Allen being present, delivered the deed to Mary Jane, and she to him; that the deed was read and given up to her; that afterwards, and not before, Allen seemed hostile to his marriage with his daughter, but they did marry: that he thought that he had the deed recorded in the Clerk's Office, and he thought he did not carry it from this district.

"J. A. Dargan, Esq., testified that between the years 1837 and 1840, G. W. & J. A. Dargan had what purported to be a deed by Richard Allen, specifying Peter, Phillis, &c., and that they had it for the purpose of a suit between Richard Allen and Seaborn Berry; that after they got it, it was taken away,

Columbia, November and December, 1857.

and delivered to them again, and that some time after the trial he believed he had delivered it to Seaborn Berry; that he could not find it; (and it was admitted that Chancellor Dargan would say he could not); that he was familiar with what was said to be a copy, but he spoke from recollection of the original.

"A notice had been served on the defendant, by which he was required to produce the original, else an office copy would be offered in evidence; the defendant's response was, that he had not the paper, and never had. (The last assertion, that he "never had," was objected to, but I received it.) I did not permit the plaintiff to introduce a paper purporting to be a copy certified as from the Register's book, nor the book itself.

"James Thornhill testified that he was Mrs Kennedy's overseer for ten years; that in the meantime, *i. e.* in 1837 or '38, Richard Allen, Mary Jane and Seaborn Berry were there, before the marriage of the two latter, a few days; that he was called into the house; that the above persons were sitting by the fire in the hall; that Mrs. Kennedy said she had called him to witness the delivery of a deed of gift from Richard to Mary Jane Allen; thereupon she went into an adjoining room, came back to the door of the partition, called Mary Jane to her, and she went, when Mrs K., said, 'here, Jane, I deliver you this deed of gift in the presence of witnesses;' that it was read by Miss Ann L. Kennedy; that three Thomas Kennedys were witnesses to its execution; that it purported to be signed by Richard Allen, and conveyed Peter, Rhina, and Phillis; that Mrs. K., said it had been left with her by Richard Allen, to be delivered to Mary Jane when called for; (here, on defendant's objection, I excluded the testimony of this witness as to its terms); that the witnesses were Mrs. K.'s, connections, and he thought he had heard they were all dead; that two of the witnesses were named Thomas, he thought all three were; that Richard

Berry vs. Joardan.

Allen was in condition to see and hear every thing, and made not any objection, or said a word.

"Upon this evidence 'I held secondary evidence of the contents of the deed to be admissible; and Thornhill said, he remembered enough of the original paper to say that the paper before him was a copy. After glancing at the paper, at any rate not reading it carefully or entirely, he undertook to give the contents of the original deed from memory, as he heard it read by Miss Kennedy, and stated it thus: 'I, this day, give to my daughter Mary Jane, Peter, Rhina and Phillis, and to the issue or heirs of her body; and if she dies leaving no heirs, (or issue, I forget which,) to return to my estate and be divided as the law directs.' He said he had never seen any copy of the paper before, and affirmed that the paper before him was a true copy. He was required, on cross-examination, to read the paper, which he did, mistaking 'bear' for 'hear,' and 'divers' for 'devises.'

"Mrs. Kennedy's deposition was read, and amounted to this: that she heard Richard Allen give instructions to her husband, Thomas Kennedy, to write a deed giving certain negroes to Mary Jane; that her husband did so, and it was executed in her house about thirty-one years before she spoke; that it was placed in her care for safekeeping, and she delivered it to Mary Jane in presence of Thornhill and one Hicks, one or two weeks before Mary Jane was married; that she could not remember the date; that three negroes were conveyed, the names she could not remember; that they were intended to be entailed to Mary Jane's issue; and she had not seen the deed since; that she relied, in what she testified, upon her own recollection and having heard the deed read; that it was handed to her husband, and by him to her, to be kept in her trunk; that after the deed was delivered to Mary Jane she gave it to Berry, and she did not remember that Allen objected to the delivery.

"The copy of the deed, to which Thornhill referred, and

Columbia, November and December, 1857.

which he said conformed to the original, accompanies this report.(a)

"It appeared in evidence that defendant bought four of the negroes, now sued for, (two have been since born of Rhina,) from Berry, the plaintiff's father, in the lifetime of his mother, for fourteen hundred dollars—that while they were negotiating, defendant suggested obstacles: one was, the taking the negroes from Berry's wife, but that was gotten over by the declaration, that Berry was determined to sell; the other was, 'but there's that deed that Allen made to Mary;' with regard to which the defendant was represented to have said, 'he did not care so much about the deed then, and it was likely when the child came of age, they would be so poor they would do nothing about it.'

"A good deal was introduced as to the description of the negroes and the value of them. The four boys had been sent to Charleston in 1853, by the defendant, and exchanged for other negroes. Several of the family relations of the defendant, were called as to value; and according to their testimony, Peter and Rhina were the subject of ailments, no

(a) The copy referred to is as follows:

"STATE OF SOUTH CAROLINA,

"MARION DISTRICT:

"Know all men by these presents, that I, Richard Allen, of the State and District aforesaid, for and in consideration, the love, good will and affection which I have and do bear towards my beloved daughter, Mary Jane, and for divers other causes and considerations, me hereto moving, do lend unto my daughter, Mary Jane, three negroes named Rhina, Phillis and Peter, and all their future increase, during her natural life, and after said daughter, Mary Jane, dies, then the said negroes and their increase I give to the issue of her body forever; but, if my daughter, Mary Jane, should die leaving no issue, then the said negroes and their increase to ascend back to my estate, and be divided at my discretion, or as the law directs. Given under my hand and seal this 12th day of February, 1821.

"RICHARD ALLEN. [SEAL]

"Signed, sealed and delivered in the presence of

"THOMAS KENNEDY, Sr.,

"THOMAS KENNEDY, Jr.,

"THOMAS KENNEDY, Minor."

Berry vs. Jourdan.

doctor having been called for either ; Peter having rupture, for which a blacksmith had furnished a truss, and Rhina being the subject of fits, epileptic I suppose ; but she had produced two children since 1840 ; she was perhaps forty years old. By some of the witnesses, Peter and she were estimated, each, at \$300, and both did work in the field. The eldest two of the four boys, were born before 1840 ; Prince (said Berry) was four or five years old in November, 1840, which would make him now twenty-one or twenty-two. The others were younger in gradation, but their ages were only approximated ; they had not been accessible since, 1853. The defendant's son-in-law, Eli Odum, put the following estimate on the negroes :

Prince \$700, Isaac \$650, Tom \$600, Dick \$500, Peter
and Rhina (each \$300) 600—aggregate \$3,050.00

The conversion was in 1853, more than four
years ago. Estimating hire as follows, for
four years, viz :

Prince \$400, Isaac \$400, Tom \$350, Dick
\$300, Rhina and Peter (together) \$400—
aggregate hire 1,850.00

Total for value and hire would be \$4,900.00

It may be well disputed, I think, whether the above estimate for the value of the negroes, the boys especially, is not too low. At any rate the jury had every thing on that subject before them.

“The jury were told that I had admitted as competent, evidence of the contents of the deed, and if it were such as represented, the limitation over in favor of plaintiff, who was the only remainder-man, was good ; but, after admitting such evidence, the defendant might show, if he could, that no such deed was ever made, or if made ever delivered ; or, that its contents were misrepresented ; and if the defendant was successful on either of those grounds, on this occasion, the

Columbia, November and December, 1857.

plaintiff could not recover—moreover, that if plaintiff had maintained his case, he could recover the highest value and the highest hire between the conversion and the verdict.

“They found for the plaintiff five thousand dollars.”

The defendant appealed, and now moved this Court for a new trial, on the grounds:—

1. That the evidence of the loss of the original deed, under which the plaintiff claims, was, under the circumstances of this case, insufficient to lay the foundation for the admission of secondary evidence of its contents.

2. That the only witness who testified to the particular terms of disposition, contained in the said deed, although he swore he had never heard it read but once, and that twenty years ago; had never seen it or a copy of it since, and had not been informed by any one of its contents; was permitted to read an alleged copy made by another person, in order to refresh his memory when called to the witness' stand.

3. That the evidence of the contents of the alleged deed, and of the particular terms of it, under which plaintiff claimed, was altogether too uncertain and unreliable in its nature, to sustain the verdict for the plaintiff.

4. That the damages found are excessive, unsustained, in their amount by the testimony, as to the character and physical condition of the negroes; and the actual market value of them, or by any reasonable view which could, upon the evidence, be taken of the value, and bears the appearance of being vindictive and punitive, rather than compensatory.

Dargan, Inglis, for appellant. 1. It is submitted that, when a deed has been lost or destroyed, the *fact* must be proved; if

Berry vs. Jourdon.

positive proof of the loss or destruction cannot be had, it must be shown that a *bona fide and diligent search* has been made for it in vain, where it was likely to be found. The witness Berry, the father of the plaintiff, having failed to search among his papers for the deed, and the parties, to one of whom he supposed he had delivered it, having denied having possession of it, that *diligent and bona fide search* required by the law, and which is requisite to lay the foundation for the admission of secondary evidence, was not made. *Godier vs. Lake*, 1 Atk. 446; *Lord Peterterough vs. Mordant*, 1 Mod. 94; *Starkie's Ev.*, 1 vol., p. 229; *Floyd vs. Menting*, 5 Rich. L. R. 373; *Philip's Ev.* 256.

It is also submitted that, when sufficient evidence has been given of the loss of the deed, it must be proved to be genuine, its execution must be proved according to the nature of the instrument; if a deed, by means of an attesting witness, or by proof of his handwriting if dead, or that of the obligor if the deed be not attested. *Starkie's Ev.*, 1 vol., p. 303; *State vs. McCoy*, 2 Speers, 714.

2. The alleged copy of the supposed deed, which the witness Thornhill was allowed to read to refresh his memory, was prepared by one of the counsel of the plaintiff, and was in his handwriting; and it is submitted that the presiding Judge erred in allowing the witness to read the same; the rule, as appellant submits, will not allow a witness to aid or revive a halting or defective memory, by recurring to any other memoranda of the supposed facts, except such as were made either by himself or with his privity and known to be correct, and also such as were made contemporaneously with the facts—and certainly excludes from the witness all such as were made for the occasion, either by the plaintiff or others.

In support of the position, that the memoranda should be made by the witness himself, and be contemporaneous with the facts, or by another with his privity, when the facts were

Columbia, November and December, 1857.

fresh in his memory, the following authorities were cited and commented on. 1 Starkie's Ev. 155; *Tanner vs. Taylor*, 3 T. R. 754; *Jones vs. Stroud*, 12 E. C. R. 313; S. C. 2 C. & P. 196; *Steenkiller vs. Newton*, 38 E. C. R. 86; *Ballard vs. Ballard*, 5 Rich. 499; *State vs. Rawles*, 2 N. & M. 331.

In support of the position, that the memoranda must be made by witness himself and not by another, the following authorities were cited in addition to those cited in support of the first position taken under this ground. *Doe vs. Perkins*, 3 T. R. 749, 753; *Rex vs. Duchess of Kingston*, 11 St. T. 255; Starkie, 1 vol. 156, note; *Megoe vs. Simmons*, 14 E. C. R. 457; S. C. 3 C. & P. 75.

3 and 4. The testimony of the witnesses, especially Thornhill, Berry and Mrs. Kennedy, was examined and it was contended that it did not justify or sustain the verdict for the plaintiff.

Moses contra cited, 18 Eng. C. L. R. 273; *O'Neil vs. Walton*, 1 Rich. 234; 7 Peters, 100; 1 Rich. 144.

The opinion of the Court was delivered by

WHITNER, J. The appellant complains that secondary evidence of the contents of an original deed was admitted upon insufficient proof of its loss. This, as is well known, was a preliminary question for the Court, and to be resolved in such way as shall best promote the ends of justice, and guard against fraud and imposition.

There are certain general propositions bearing on the question sufficiently familiar to the profession, and to be found collected by most of the text writers on evidence. Their proper application will so much depend on the peculiar circumstances of each case, that but little instruc-

Berry vs. Jourdon.

tion would be derived from any attempt to embody them in an opinion. A Court of review can do little else than see to it, that these rules have been observed.

For instance, the law demands in this, as upon other questions, the best evidence to be offered of which the nature of the case admits, and which it is in the power of the party to produce. In the case of *Deumas vs. Powell*, 3 Dev. 104, it was held that though not bound to furnish the strongest possible assurance of the fact, yet the party should give all the evidence *reasonably* in his power. In the case *United States vs. Doeblor*, 1 Bald. 519, it was held, that if by reasonable diligence the original could have been produced, secondary evidence is not admissible. Greenleaf, sec. 558, has the rule, that, in general, the party is expected to show he has in good faith exhausted, in a *reasonable* degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. The specific objections were mainly rested in the argument of this branch of the case, on the want of a diligent search for the paper and proof, that it was, in fact, genuine. But we are of opinion the evidence satisfies what the law requires on the preliminary question made to the Court. If any doubt has been entertained upon the proof then before the judge, that doubt must be entirely removed by the sequel in the testimony clearly corroborated by the verdict of the jury.

This was a case in which there was no conceivable motive for the suppression of the original deed by the party desiring to set it up, and not the slightest pretence of any default on his part, as the whole case clearly shows. The witness, Seaborn Berry, having removed from the country long since, proved that he had not taken the paper with him, that he had in his possession very few papers of any description, and he could say, positively, this paper was not amongst them. That he had left it in the hands of the defendant, or

Columbia, November and December, 1857.

with the attorney of one who it seems was engaged in litigation, wherein, for the protection of his interests then in controversy, it was necessary to set up this paper. The defendant, on notice, denied that it was now or ever had been in his possession, though, in fact, it had been left with his counsel, and was not now in their possession. It is true, one of the counsel believed, that after the trial in that case, he had delivered it to the same witness, Berry; yet it will be seen, the fact was not asserted, nor was it certainly ascertained—under the circumstances, where should a further search have been made, and what could it have disclosed beyond what was ascertained with reasonable certainty, that the paper was not then in the possession of either of the former custodians. In reference to the genuineness of the paper, in such a case as the present, there is much reason for the relaxation of the ordinary rules applying to the proof of execution. Many years had elapsed—the subscribing witnesses were all dead, the paper had been formally delivered in the presence of the party alleged to have made it, without objection on his part, and against whom it had been doubtless used as a genuine paper. But as has been already intimated, this preliminary evidence was greatly corroborated by subsequent proof, that instructions had been given by the party for its preparation, that it had been accordingly prepared, and after execution, had been deposited more than thirty years ago for safe-keeping and delivery; and that the delivery was, in fact, made in the presence of other witnesses called to the fact, and of the party himself without objection.

The second ground of appeal complains that the witness was permitted to read an alleged copy made by another person, in order to refresh his memory.

We do not understand that such a question was raised on the circuit, or rather so presented as to render necessary any judgment of the circuit Judge. As a fact, we are

Berry vs. Jourdon.

informed by the report, that "after glancing at the paper, at any rate, not reading it carefully or entirely, the witness undertook to give the contents of the original deed from memory." It was alleged in argument, and seemed to be conceded on the other side, that though the paper was before the witness in the manner reported, yet as soon as objection was made, the paper was withdrawn; and on his cross-examination it was, that he was required to read, &c. The authorities, cited by counsel, fully sustain most of the general propositions insisted on in argument. It must be observed, that in this instance, as strangely as it may strike any one, the witness professed to speak from memory as to a fact, derived in a particular way, the reading of the original deed in his presence. It cannot be that the paper in question was so read by the witness, an illiterate man, as to refresh his memory when on the stand, or in any way lead him to the answer indicated. In declining to entertain this ground, therefore, we might rest upon the attendant facts. But the rule is very clearly laid down in *Greenleaf*, sec. 436, and 1 *Philips*, 289, n., that though a witness can testify only to such facts as are within his own knowledge and recollection; yet he is permitted to refresh and assist his memory, by the use of a written instrument, memorandum, or entry in a book; and it does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection. The adjudged cases are so fully collected by these writers, and in the notes appended, as to render unnecessary a further reference. The certified copy, it may be remarked, was neither offered nor admitted in evidence, because it was not such a paper as was required by law to be registered in that office.

In reference to the third ground of appeal, it has been already intimated that the testimony of the witness, according

Columbia, November and December, 1857.

to his own affirmation, was altogether remarkable. It involves a question peculiarly for the jury, and finding, as we do so much to corroborate the fact disclosed by this witness, derived from other sources, that we could in no way justify ourselves in sending the case back upon this point. The contents were referred to by other witnesses, though in more general terms. It was a paper that had seen the light in that very community where this investigation has been had, and had been in the hands of very intelligent persons, who doubtless could and would have been called if there was reason to apprehend that this was a device and fabrication. There is still less on which to rest the fourth ground of appeal. The amount fixed upon by the jury, was well authorized by the testimony. Though it has fallen upon this defendant, under adverse circumstances, if it be true, as was shown, that with his eyes open as to the hazard he encountered, he chose to rely that a day of reckoning was not likely to come, he may be regarded as a proper subject for a full measure.

The motion for a new trial is dismissed.

O'NEALL, WARDLAW, WITHERS, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Faries vs. Smith.

ROBERT FARIES vs. THE ADMINISTRATOR OF H. H. SMITH.

*Warranty—Breach of Covenant for quiet enjoyment
against Warrantor himself.*

A warranty in the usual form against the grantor and his heirs is a covenant as well of seizin as for quiet enjoyment, not against the world, but against the grantor and his heirs.

Where the grantee is evicted by one who claims under an older deed from the grantor, such eviction is a breach of the covenant for quiet enjoyment against the warrantor himself.

BEFORE O'NEALL, J., AT YORK, FALL TERM, 1857.

The report of his Honor, the presiding Judge, is as follows :

"This was an action of covenant, on a deed of conveyance of land executed by the defendant's intestate. The warranty was against himself and his heirs. He had, before he conveyed to the plaintiff, conveyed to another, a portion of land which conflicted with the plaintiff's title, and cut off twenty-three acres. The grantee, under the intestate's senior deed, entered upon the land thus covered by it.

"This was assigned as a breach of the covenant of quiet enjoyment against the intestate and his heirs. I thought the ouster under his deed was the same as by himself, and hence the plaintiff was entitled to recover. The jury found accordingly."

The defendant appealed, and now moved this Court for a new trial, on the following ground :

Because his Honor, the presiding Judge, instructed the jury that the deed executed by H. H. Smith to the plaintiff,

Columbia, November and December, 1857.

contained a covenant of quiet enjoyment, and the plaintiff was entitled to recover against the defendant, administrator of said H. H. Smith, on its being shown that H. H. Smith, before his conveyance to plaintiff, had conveyed a part of the land to another who had lately entered on it—when it is respectfully submitted he erred therein, and said deed contained no covenant for quiet enjoyment, except against H. H. Smith and his heirs, who never interfered with said enjoyment.

Williams, for appellant. From the words "grant, bargain, sell and release," used in our ordinary deeds of conveyance, with a clause of general warranty against all persons—the law implies a covenant of seizin and also of quiet enjoyment. But in this deed, the warranty is against H. H. Smith and his heirs, and it is submitted that as an express covenant is contained in the deed, none can be implied from the general words of the conveyance. *Stannard vs. Forbes*, 6 A. & E. 572. It may be that as Smith was not seized of the twenty-three acres, at the time he conveyed to plaintiff, there was a breach of the covenant of seizin. But the plea of the statute of limitations, pleaded, disposes of that matter. The grantor covenanted for quiet enjoyment against himself and heirs. Is a previous conveyance by himself and entry under it a breach of said covenant? If a lease contain a covenant for quiet enjoyment against the lessor and those who claim under him, the lessee cannot, upon an eviction by a paramount title, recover under the implied covenant for general title implied in the word demise. 2 Steph. Nisi Prius, m. p. 1081. Covenant for title against the acts of the covenantor and those claiming under him, is not broken by the circumstance of the previous death of covenantor's *cestui que vie*. *Stannard vs. Forbes*, 6 A. & E. 272; *Jeter vs. Glen*, 9 Rich. 379; 2 Bos. & P. 13.

Faries vs. Smith.

Witherspoon, contra, cited *Bond vs. Quattlebaum*, 1 McC. 584.

The opinion of the Court was delivered by

O'NEALL, J. I entertain so little doubt about this case, that I shall very briefly present my views. Our deeds are said, in the clause of warranty, to contain covenants of seizin and quiet enjoyment. A warranty against a man and his heirs must necessarily be both a covenant of seizin, and also of quiet enjoyment, not against the world, but against the warrantor and his heirs. For the limitation as to the covenants is merely as to the persons, against whom he warrants.

An entry under the title of the warrantor is the same as an entry by himself. For his title authorizes the entry: and when a recovery of the premises is had under his deed and an eviction follows, it is the same as an eviction by himself, and that is a breach of the covenant of quiet enjoyment against himself.

These principles are so plain, that every lawyer must acknowledge them, and authority cannot be necessary to sustain them.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, November and December, 1857.

CHRISTOPHER NEAL vs. ALFRED M. NEAL.

Contract—Indebitatus Assumpsit—Money had and received.

A. and B. having agreed to exchange lands, A. conveyed his to B., and B. gave A. bond to make titles. B. sold the land which A. had conveyed to him, and either sold or failed to identify the land he had bound himself to convey to A., and having got possession of his bond to make titles, kept it:—*Held*, that B.'s conduct amounted to a rescission of the contract, and that A. might maintain *indebitatus assumpsit* against him for the value of the land, A. had conveyed to him, or for the money he had received for it.

BEFORE MUNRO, J., AT ANDERSON, FALL TERM, 1857.

A statement of the case is contained in the opinion delivered in the Court of Appeals.

Under the instructions of his Honor the jury found for the defendant. The plaintiff appealed:

McGowan, for appellant, cited Com. on Con. 293, 250; *Bowers vs. Watson*, 1 Mill, 393; Rice, 188; 1 Strob. 106; *Rupert vs. Dunn*, 1 Rich. 102; 3 Bl. Com. 163; 2 Esp. R. 639; 7 Cow. 24.

Wilkes, Reed, contra, cited 1 Ch. Pl. 98, 102, 243; 3 McC. 114.

The opinion of the Court was delivered by

GLOVER, J. The action was assumpsit, brought by Christopher Neal against Alfred M. Neal, his brother, and the case

Neal vs. Neal.

was this:—Sometime between the years 1840 and 1845, the plaintiff and defendant agreed to exchange certain lands which they owned in Georgia; and, in pursuance of that agreement, the plaintiff conveyed to the defendant two lots in Lee county; the defendant, at the same time giving his bond to make titles for a lot situate in the Cherokee country. Afterwards the defendant sold the lots in Lee county for four hundred dollars, and also either sold or failed to identify the lot in the Cherokee country, for which he was under obligation to make titles in consideration of the land that he had received in exchange in Lee county. The defendant also took from the plaintiff's trunk, in his absence and without his knowledge or consent—says Thomas Neal, a brother of both—the bond which he had given to make titles. On several occasions, and as late as 1855, the parties had frequent interviews and conversations respecting this exchange of lands, in which the defendant promised to pay what was right. Thomas Neal was employed and sent by the defendant to examine a lot in Cobb county, which he alleged to be the one which he had exchanged with his brother and promised to pay the amount that his agent should determine to be its value.

Thomas reported, that “the land was a straddle of a mountain, and not worth a dime,” which the witness said was satisfactory to the defendant, but not to the plaintiff who denied that he had consented to receive in exchange a lot in Cobb county. On another occasion, or rather to another witness, the defendant said, that the lot selected by plaintiff was in Paulding county, which he also denied.

This is a brief and unvarnished account of the course of dealing and conduct between two brothers respecting an exchange of their lands, slightly varied in some unimportant particulars by contradictory statements; but, after an impartial consideration of the evidence, to this complexion it will

Columbia, November and December, 1857.

On this evidence the plaintiff has brought his action to recover damages and, in the first count of his declaration, sets out the agreement to exchange lands, avers his compliance by the execution of titles and alleges as a breach the neglect and refusal of the defendant to perform his promise. The second count is *indebitatus assumpsit* for the value of the two lots in Lee county sold and conveyed to the defendant, and also the money counts; and the single question submitted by the plaintiff's grounds of appeal in support of his motion for a new trial is, whether he can recover on these allegations and the proof made to sustain them.

The first count presents a case where relief may be afforded by a decree for specific performance in another forum; but is not the foundation of an action for damages for the breach of the agreement. A recovery on the second count—indeed on all the counts—is resisted on the ground, that the plaintiff had a bond for titles to the land, which was the consideration of the two lots in Lee county, and that his remedy is on the bond. Such an objection is only plausible and deserves little favor when urged by one who is not only in possession of the bond but has sold the land, and has thus voluntarily rendered it impossible to discharge his obligation. The sale of the land by the defendant and his promise to pay its value to the plaintiff, operated as a rescission of the contract to exchange lands, and left the defendant indebted for the value of the two lots in Lee county, conveyed by the plaintiff to him. If the contract is rescinded by the defendant's acts, he is then responsible as a purchaser and may be liable under the second count for the value of the lots; but he cannot escape from the count for money had and received, which embraces all that class of cases where one person, in any manner, has the money of another which *ex æquo et bono*, he should return.

In *Bours & Bascombe, vs. Watson*, (1 Mill, 393,) a person got by mistake of the clerk, twice as much goods as he had bought, and having converted them to his use, it was held,

Neal vs. Neal.

that the conversion amounted to a tacit consent that he would pay for them, and that the law will imply a promise to do so. The application of a principle so just and reasonable, to this case, establishes the defendant's liability under the count for money had and received, unless he shall be able to escape it, by the introduction of new evidence on a second trial, which is ordered; and the plaintiff's motion is granted.

O'NEALL, WARDLAW, WITHERS, and WHITNER, JJ., concurred.

Motion granted.

Columbia, November and December, 1857.

THE BANK OF THE STATE OF SOUTH CAROLINA vs. STEPHEN BRIDGES.

Trespass to try Title—Estoppel—Title subsequently acquired.

Where there is a recovery against the defendant in an action of trespass to try title, and he subsequently acquires title by taking out a grant and re-enters, the recovery in the first is no estoppel in a second action for the same land.

BEFORE MUNRO J., AT SPARTANBURG, FALL TERM, 1857.

The report of his Honor, the presiding Judge, is as follows:

"This action was trespass to try titles. The plaintiff claimed title to the land in controversy, under a grant from the State to one Abraham Markley, for one thousand acres, date the 3d Nov. 1788. On the 22d June, 1822, the plaintiff recovered a judgment against Markley for a large amount; which judgment, having been subsequently revived against Markley's legal representative, the land in question was levied upon and sold by the Sheriff of Spartanburg, and bid off by the plaintiff, to whom it was conveyed by Sheriff Pool on the 14th day of October 1847.

"The land was proved to have been originally well timbered, but that from the latter part of the year 1855, or the commencement of 1856, the defendant had cut down and carried away a large quantity of it, supposed to be about two-thirds.

"It was proved by one of the plaintiff's witnesses, that the defendant admitted that he was cutting the timber for the South Carolina Manufacturing Company,—and by another witness,—Wm. Westbrook—that defendant had said 'he was

Bank vs. Bridges.

cutting for Mr. Bobo, and that he would go on cutting, as long as directed to do so by Mr. B.'

"It was proved by another witness, James Nesbit, that Mr. Bobo was now, and had been for the last eight or ten years, a stockholder in, and the Superintendent of said Company.

"It was at this stage of the case that the plaintiff offered in evidence the record referred to in the first ground of appeal, the title of which is 'The Bank of the State of South Carolina vs. the South Carolina Manufacturing Company,' on which a recovery was had by the plaintiff against said Company for the land in question.

"The ground insisted upon for the admissibility of the evidence in question was, that as Mr. Bobo was a stockholder of the Company at the time the judgment was rendered, and as defendant had cut the timber by Bobo's direction, and for the use of the Company, such a privity was thereby created between the defendant and the Company, as to operate as a conclusive estoppel upon his right to contest the plaintiff's claim to the land in question."

"The defendant then introduced a grant from the State to Simpson Bobo for nine hundred and eighty-seven acres, date the 25th of June 1851. As the remaining question was one exclusively of location between the Markley and Bobo grants, it was submitted to the jury, who found for the defendant."

The plaintiff appealed, and now moved this Court for a new trial on the grounds:

1. Because the Court refused to admit in evidence the record in the case of the Bank of the State of South Carolina against the South Carolina Manufacturing Company.

2. Because the verdict is against law and evidence.

Thomson, Choice, for appellants.

Bobo, contra.

Columbia, November and December, 1857.

The opinion of the Court was delivered by

MUNRO, J. Whether there was error in excluding the record referred to in the plaintiff's ground of appeal, depends upon two things. 1st, Was there such a privity established between the defendant, and the parties litigant in such proceeding, that the former is as much bound by it, as if he had actually been a party thereto, and if so, is he thereby forever estopped from setting up an adverse title to the land, no matter where, or from whom he may have acquired it?

In reference to the first point, the defendant's legal identity with the parties to the record in question, we confess to no little difficulty in comprehending, how a body corporate, for such we are given to understand was the character of the South Carolina Manufacturing Company, at the time of the recovery against it, a mere legal entity, a factitious creature of the law, could be held capable of committing a trespass. If a body corporate can be held capable of committing a trespass, may it not with equal reason, be held capable of committing treason, felony, or breach of the peace.

Such doctrine, would doubtless have been viewed as a novelty, at the time when Mr. Chitty published his work on pleading. See 1 Chitt. Pl. 46.

But we are spared the necessity of deciding that point, for conceding the defendant to have sustained toward the parties to that proceeding the relation which is contended for, it by no means follows, however, that he is forever precluded from contesting the plaintiff's title.

The defendant, as we have seen, entered upon the premises in dispute, under the grant which had been taken out by Mr. Bobo, subsequent to the termination of the plaintiff's action against the South Carolina Manufacturing Company. In that action both parties claimed the land in dispute, under the Markley title; the contest, as we have seen, resulted in favor of the plaintiff; and to that extent, that is, so far as the Markley title was concerned, such recovery was conclusive

Bank vs. Bridges.

upon the defendants, and those claiming title under them. But it has never been doubted, that after a recovery in ejectment, it is entirely competent for the defendant to re-enter the premises under an independent title, subsequently acquired, and not previously adjudicated.

It is not the former recovery which constitutes the estoppel, it is the subject matter which was in contestation between the parties; upon the familiar principle, that where the same point has been litigated between the same parties, and decided upon by a Court of competent jurisdiction, it cannot be again called in question. See *Jones vs. Muldrow*, Chev. 254; 3 East, 355.

We are therefore satisfied, that the record offered in evidence by the plaintiff, was properly excluded, and the motion is dismissed accordingly.

O'NEALL, WARDLAW, WITHERS, WHITNER and GLOVER, JJ., concurred.

Motion dismissed.

Columbia, November and December, 1857.

WILLIAM LEWIS vs. THE WILMINGTON & MANCHESTER
RAILROAD COMPANY.

Railroads, Compensation for Lands taken by—Vendee.

The right to claim compensation from the Wilmington and Manchester Railroad Company for land taken for the track of their road, belongs to the owner of the tract at the time the road was finished through it, or his legal representative, and not to a vendee who purchased the tract from the owner after the road was finished through it.

BEFORE MUNRO, J., AT SUMTER, FALL TERM, 1855.

William Lewis, the petitioner, purchased from one Norton, a tract of land through which the road of the Wilmington and Manchester Railroad Company passed. The purchase was after the road was finished through the tract. The petitioner claimed compensation for the land taken by the Company and prayed the appointment of Commissioners under the Act of 1846, (11 Stat. 388) constituting the charter of the Company, to assess the value of the land. The Company resisted the appointment of Commissioners.

His Honor held, that the terms of the Act were explicit, and left to the Court no discretion to refuse the prayer of the petition, which was granted.

The defendants appealed and moved this Court to reverse the order made on circuit, on the grounds:

1. That the injury, if any, done to the land, was done while it was owned by Norton, and the right of action therefore exists in him, and the defendants are accountable to him for the loss and damage, if any, done to the land.

Lewis vs. Railroad Company.

2. That the title of the purchaser acquired since the road has been finished and gone into operation, gives him no right of action for the previous injury; and even if construed as an assignment of the right of action therefor, does not entitle him to bring the action in his own name.

The case was argued three times by *Haynsworth* and *Moses*, for appellant, and by *Blanding*, contra.

The opinion of the Court was delivered by

GLOVER, J. The defendant is authorized to enter upon all lands and tenements through which the line of railroad may pass, and the XVI. Section provides for compensation to the "owners," for want of agreement as to the value, or if from any other cause the land cannot be purchased, by the appointment of Commissioners whose valuation without appeal is conclusive, and the land or right of way is vested in the Company in fee simple as soon as the valuation is paid, or is refused when tendered. (11 Stat. 388.)

The XVII. Section is in the following words:—"In the absence of any contract or contracts with the said Company, in relation to land through which the said railroad may pass, signed by the owner thereof or by his agent, or any claimant or person in possession thereof, which may be confirmed by the owner thereof, it shall be presumed that the land upon which the road may be constructed, together with a space of sixty five feet on each side of the centre of said road, has been granted to the company by the owner or owners thereof, and the said Company shall have good right and title thereto and shall have, hold, and enjoy the same as long as the same may be used only for the purposes of the said road, and no longer, unless the person or persons owning the said land at the time that the part of the said road which may be on the

Columbia, November and December, 1857.

said land was finished, or those claiming under him, her, or them, shall apply for an assessment of the value of the said lands, as hereinafter directed, within ten years next after the said part was finished; and in case the said owner or owners, or those claiming under him, her, or them, shall not apply for such assessment, within ten years next after the said road is finished, he, she, or they, shall be forever barred from recovering the said land or having any assessment or compensation therefor: Provided nothing herein contained shall affect the rights of *feme covert*s or infants, until two years after the removal of their respective disabilities."

The general scheme adopted to secure to the Company the right of way, and compensation to the landholder, is manifest. —For the want of agreement as to the value of the land taken, or when it cannot be purchased, the XVI. Section directs a valuation by commissioners. But in the absence of any contract, or of any valuation by commissioners, within ten years from the completion of that part of the road, the XVII. Section authorizes the company to hold the land as long as it shall be used for the purposes of a road, and presumes a grant from the owner for that purpose: and should no application for an assessment be made within ten years, then the owner is *forever barred* from recovering the land or having any assessment or compensation.

Norton was the owner of the whole tract when that part of the road was located and finished over it, and having afterwards sold to Lewis the right of the latter to apply for an assessment, is placed on the assumption that he is one claiming under the owner. At the time the road was finished, Norton no longer had any interest in so much of the land as had been appropriated to its use, which could pass by his conveyance. His deed would not have divested his title more effectually than did the provisions of this Act, vesting in the Company so much as was required for the purposes of the road. In

Lewis vs. Railroad Company.

consideration of his property taken for public use, the law secured to Norton the right to demand and have full compensation, and Lewis who never was the owner of the land occupied by the road, can claim no right to have an assessment which is provided for him who is the owner when the road is finished.

It is not the land but the right to compensation that is involved in this controversy, and he is entitled to it whose land has been dedicated to the public use and not his vendee, who holds only the balance of the tract. The construction contended for by the appellee defeats the express intention of the Act, which provides compensation for the owner, and the XVII. Section directs that he who is owner when the road is finished shall apply for an assessment. The further provision "or those claiming under him" could not have contemplated Norton's vendee, who neither purchased the land vested in the Company, nor had been deprived of property for which compensation was made, who cannot be regarded as a privy in estate or, by his purchase, having such an interest as would support his claim for an assessment and valuation. The land or right of way is vested in the Company in fee simple as soon as the valuation is paid, or is refused when tendered; and if application for an assessment is not made within ten years after the completion of the road, the owner is forever barred from recovering the land or having an assessment, which manifests the intention of the Legislature to divest the owner's title, reserving to him the right to claim the purchase money or compensation alone, and in respect to this Lewis cannot be regarded as one claiming under Norton.

It is a claim or interest which Norton alone could assert or dispose of in his life time, and in the event of his intestacy, would be under the control of his legal representative or distributees.

This construction, in the opinion of a majority of the Court,

Columbia, November and December, 1857.

is warranted by the words employed, and is reasonable and consistent with the just and legal rights of the parties.

Motion granted.

O'NEALL, WITHERS, and WHITNER, JJ., concurred.

WARDLAW, J. I dissent. The application for compensation differs altogether from an action for a legal injury, and to it all observations about assignment of a suit for trespass, about wrong endured, and the like, are inapplicable.

Under the construction which I give to the sections of this Company's charter, which have been cited, the vendee of a tract of land through which the railroad runs, takes under a conveyance of the tract, made without exception, the whole, —as well that occupied by the railroad as the remainder: —if he should permit the railroad Company to hold, without complaint, until the expiration of ten years from the time the road was there finished, the land would become subject to the Company's right to enjoy the slip occupied by them, so long as they continued to use it for their road, and no longer: —but if compensation should be claimed and paid, the fee simple absolute would thereby be vested in the company. Is it proper that a former owner should be permitted to effect this transfer of the fee, contrary to his own conveyance, and perhaps contrary to the will of the present owner? By what reserved right can this be done?

The words "claiming under him" must in this Statute as in others, comprehend vendees. If they include *heirs*, then the right to compensation must descend with the land. If they mean only *executors and administrators*, then the application for compensation is in the nature of a remedy for a debt due to one who owned the land at a particular time, and the obtaining of this debt by the personal representative of that

Lewis vs. Railroad Company.

person, operates an influence upon the land which he conveyed.

The vendee, it is said, gives a price, increased or diminished according to the benefit or detriment which has come from the railroad:--it is just as reasonable to say that, in fixing the price, he considers the right to compensation, which passes as an incident to the land.

An application filed is equivalent to *lis pendens*, notice to the world, and this answers all suggestions of compensation claimed by successive owners.

Motion granted.

Columbia, November and December, 1857.

JOHN T. SLOAN *vs.* ANSON BANGS & Co.*Partnership—Contract—Competency of witness.*

Where S., one of two members of a firm engaged in the manufacture of carts, agreed with defendants to make and deliver to them a number of carts, which the firm afterwards made and delivered, *held*, upon the evidence, that the contract was not made with the firm, that S. alone could sue upon it, and that G., the other member of the firm, was a competent witness for S., he, G., testifying that the firm had declined the contract, that it looked to S. alone for payment, and that he, S., had paid G. his share by giving him his promissory note.

BEFORE O'NEALL, J., AT ANDERSON, JULY, EXTRA
TERM, 1857.

The report of his Honor, the presiding Judge, is as follows:

"This case was twice tried, first on a plea in abatement, that the plaintiff was the partner of Wm. H. D. Gaillard & Co., with whom, in law, the plea alleged the contract was made, and that therefore he could not sue alone; upon this plea an issue to the country was made, and resulted in a verdict for the plaintiff, and *there* would have been an end of the case, except to assess the damages of the plaintiff had it not been that an order, by consent, had been made, that the defendants, in such an event, should have leave to answer over. They pleaded the general issue, and the case was tried, and resulted in a verdict for the plaintiff on the merits.

"The grounds of appeal, in both issues, are so identical, that I shall report the case as one.

"The defendants, Anson Bangs & Co., were contractors

Sloan vs. Bangs & Co.

on the Blue Ridge Railroad; they desired to have constructed two hundred and fifty carts. On the 13th of July, 1853, Anson Bangs wrote to John T. Sloan to take the contract. Much of the appeal rests upon the competency of Wm. H. D. Gaillard; he was examined in both issues, both on his *voire dire* and in chief. He stated that the firm of Wm. H. D. Gaillard & Co., engaged in making carriages and buggies, at Pendleton, consisted of himself and John T. Sloan. He said that he refused to have any thing to do with the contract with Bangs. Sloan undertook the contract alone, and went on to the North. On his return, he gave the firm the opportunity of making a part of the carts; and Sloan has paid the company in full; their settlement was made in the progress of this case. The damages *here*, he said, will not fall on him. If the carts, as manufactured by the shop, produce loss, then the shop would lose *pro tanto*; if they were a profitable job, then, of course, he would share in the profits. The carts were charged on the books to Anson Bangs & Co. The first bill for fifty carts was made out in the name of W. H. D. Gaillard & Co. The plaintiff, on the 21st January, 1854, wrote a letter, announcing the completion of fifty carts, and asking a payment, and signed it W. H. D. Gaillard & Co. On the 5th of May, 1854, John T. Sloan, alone, drew a draft on Anson Bangs & Co., in favor of W. H. D. Gaillard & Co., for fifteen hundred dollars, on account of railroad carts; they paid this draft. He (Gaillard) stated he received the subsequent payments from Bangs & Co., by the verbal authority of J. T. Sloan. He proved a letter of J. T. Sloan, 25th November, 1854, addressed to Bixby and Birdsall, in which he speaks of "*our account*," and "*we are not particular about the money*." The settlement hereinbefore spoken of, and by which Sloan paid him for all his interest in the manufacture of the carts, was intended to remove any objection to his competency as a witness in this case. He said he looked to Anson Bangs & Co., through

Columbia, November and December, 1857.

the plaintiff, for the work done by the firm. He repeated he had nothing to do with the contract about the carts. Sloan said, if you will make the carts, you can get what I am to have. He said Sloan said to him Bangs wanted to have the carts made; witness replied, he wanted to have nothing to do with them; Sloan then said, he would have them made, if he had to hire hands to make them. At first he only engaged to make fifty at the price Sloan was to have, then two hundred and fifty. He repeated he had nothing to do with Bangs.

I have thus stated the whole testimony of Gaillard on the objection as to competency; and as to his interest in the contract, I thought he was competent; that Sloan alone made the contract, as appeared from Bangs's letter, and the proof of Mr. Gaillard; that the firm were merely sub-contractors. There was proof to show that Gaillard & Co. purchased many of the materials for the carts, and one witness, Myron Bangs, proved that he heard the plaintiff say the carts were to be built by W. H. D. Gaillard & Co., at Pendleton.

"On the part of the plaintiff, Wagner proved that Bangs inquired whether the plaintiff was responsible; he said that Bangs & Co. had made a contract with him for two hundred and fifty carts. Abram, Sergeant proved that Bangs told him that he was to give the plaintiff fifty dollars for each cart, and the railroad freight from Charleston. H. Campbell said that Bixby, one of the partners of Bangs & Co., said there were carts at Pendleton which belonged to John T. Sloan, or him, and he would run the risk of letting him have one.

"T. R. Breckenridge proved that Sloan and Bangs came to Laurens' Mill. Sloan, Laurens and witness, made a contract as to the lumber for the carts.

"I have thus stated, I think sufficiently, the facts of the case to enable the Court to decide whether Wm. H. D.

Sloan vs. Bangs & Co.

Gaillard was a partner with Sloan in the contract, and whether he had such interest in the case as rendered him an incompetent witness? A diagram of the cart to be made was furnished by Bangs, and the plaintiff's work I thought fully corresponded with it. There was a vast deal of proof whether the one hundred and fifty carts made, were made according to the contract, and whether they were well or ill made, and as to their value. So, too, there was proof that the defendants directed the plaintiff, or Gaillard & Co., to stop making the carts when one hundred and fifty were made, and that damages were sustained by the plaintiff in the loss of materials, &c., to a large amount.

On the plea in abatement, I submitted the questions to the jury, fully and fairly, whether Wm. H. D. Gaillard was a partner with Sloan in the contract. The testimony on both sides was fully and fairly collated, and submitted; and I gave as I suppose, no indication of my conclusion, and from my notes of my charge no comments like those contained in the grounds, appear.

"On the general issue, I again submitted to the jury whether the contract was made with Sloan alone, or with Gaillard & Co. I gave no such instructions as that contained in the fifth ground, for the letter was most material to show with whom the contract was made, and the specifications of the carts; the offer of price, I thought, was not conclusive, and the parties might afterwards very well have added the freight on the railroad; so, too, the specifications of the carts might have been altered by Bangs, as proved by Gaillard, and as shown by the diagram; and further, that if he was believed, one hundred and fifty carts were made, delivered and accepted. The value of these carts were variously fixed by different witnesses. If the sixth ground means that I refused to permit the jury to have the diagram to look at, and examine in Court, or in their room, it is founded in mistake. If it means that I did not submit the question to

Columbia, November and December, 1857.

the jury upon the letter, diagram and proof, that also is a mistake.

"I gave the jury the full opportunity of finding for the defendants, if they chose; if they found for the plaintiff, I made various calculations to aid them in their conclusions. They took their own view of the sum to be allowed for the carts, and the damages. Interest was allowed according to the contract on the price of the carts, none was allowed on the damages found for the dissolution of the contract by the defendants.

"The jury found for the plaintiff the sum of three thousand six hundred and sixty-six dollars and sixty-six cents, after deducting the defendants' payments, which I thought a very reasonable finding."

From the verdict on the issue in abatement, the defendants appealed, and now moved this Court for a new trial, on the grounds:

1. Because his Honor admitted W. H. D. Gaillard to give testimony in the case, after he had acknowledged, on his *voire dire*, that he was a partner with plaintiff in the manufacture of wheel carriages, under the firm of W. H. D. Gaillard & Co.; that the carts, for the making of which this suit was brought, were made at the shops of W. H. D. Gaillard & Co., by the concern; that he was a partner of plaintiff in making said carts, and was to share with him in the profits and loss of their manufacture; that in their books the carts were charged to Anson Bangs & Co., and not to John T. Sloan; that bills were made out in the name of W. H. D. Gaillard & Co., against Anson Bangs & Co., for the carts as made; and that when payments were made by Anson Bangs & Co., for the said carts, they were receipted for by W. H. D. Gaillard & Co., and credited to Anson Bangs & Co., on their books.

Sloan vs. Bangs & Co.

2. Because his Honor charged the jury, that notwithstanding the contract to make the carts was made by John T. Sloan, a partner, and the only partner with W. H. D. Gaillard in the firm of W. H. D. Gaillard & Co., and notwithstanding the carts were made by the said firm, charged in the books of the firm to Anson Bangs & Co., payments made the said firm by Anson Bangs & Co., for the carts, yet the jury might presume it was not a partnership demand of W. H. D. Gaillard & Co., against Anson Bangs & Co., but an individual demand of John T. Sloan against the said Anson Bangs & Co., upon which he, the said John T. Sloan, might sue in his individual capacity.

3. Because W. H. D. Gaillard admitted in his testimony that he and his partner, John T. Sloan, had had a settlement after this action was brought, for the purpose of trying to make him, the said W. H. D. Gaillard, a competent witness, to prove the demand of his co-partner, John T. Sloan, against the said Anson Bangs & Co., on account of said carts.

4. Because such a stratagem, entered into by partners in making the carts, and who had equally shared the profits of the contract, with a view of sustaining the action, was in violation of well-known principles of the common law, which forbids any one to give evidence in his own case.

5. Because W. H. D. Gaillard having shared the profits of the contract, could not be released by his partner, or release his partner, so as to make him a competent witness to testify in the case.

6. Because the finding of the jury was not only without evidence, but contrary to the evidence and the whole circumstances of the case, which showed that the contract

Columbia, November and December, 1857.

to make the carts was made by John T. Sloan, as a member of the firm of W. H. D. Gaillard & Co., and that the carts were made by the said firm, charged in their books, and receipted for in the name of the firm.

From the verdict on the general issue, the defendants also appealed, and now moved this Court for a new trial, on the grounds:

1. Because his Honor admitted W. H. D. Gaillard to give testimony in the case for the plaintiff, after it was shown, as is respectfully submitted, by his own acknowledgments on his *voire dire*, and by the papers which he proved in the cause, that he was interested alike in the manufacture of the carts, for which the action was brought, and in the result of the suit, and was, therefore, an incompetent witness.

2. Because his Honor charged the jury, that there was nothing in the case to show that W. H. D. Gaillard, was a partner with plaintiff in the manufacture of the carts; that the letters written by him, and all he did in the matter, was for plaintiff and easily explained; that the question as to whether he was a partner or not, was settled by the verdict on the plea in abatement; when, it is respectfully submitted, after Mr. Gaillard had proven in this case that the carts were manufactured by W. H. D. Gaillard & Co., himself and plaintiff constituting the firm, that he was interested in their manufacture, shared in the profits and loss of the contract, charged the carts on the books of W. H. D. Gaillard & Co., to defendants, made out the bills for the carts in the name of W. H. D. Gaillard & Co., and receipted for payments for said carts in the name of W. H. D. Gaillard & Co., his Honor should have submitted to the jury to pass upon the question of fact, as to whether W. H. D. Gaillard was a partner in the contract for the carts or not, and should have said to them,

Sloan vs. Bangs & Co.

that if they believed him to be a partner, then they had a right, and it would be their duty to reject his testimony.

3. Because W. H. D. Gaillard admitted in his testimony, that he and plaintiff had made a settlement after this action was commenced, for the purpose of trying to make himself a competent witness for plaintiff; that plaintiff had given his note to W. H. D. Gaillard & Co., for making the carts, and yet he refused to say whether he ever expected plaintiff to pay said note or not; and whilst he admitted that he was interested in the profits and loss of manufacturing the carts, he would neither admit or deny that he was to share the damages which were claimed, and might be recovered in this case; whereby was evidenced an ingenious stratagem, to render competent, evidence which the parties knew to be inadmissible otherwise—which stratagem, if successful, must defeat the ends of justice as secured by the great principles of the common law, prohibiting a party from testifying in his own cause, and should not, therefore, be allowed to prevail in this Court.

4. Because W. H. D. Gaillard, having shared in the profits of the contracts for making the carts, with his partner, John T. Sloan, the plaintiff, could not be released by his partner, or release his partner, so as to make him a competent witness to testify in the case—and his testimony, therefore, should have been rejected by the Court.

5. Because his Honor, charged the jury that the letter from Anson Bangs to John T. Sloan, dated 13th July, 1853, was no evidence of the contract for making the carts; that the only evidence of the contract was to be found in admissions of Anson Bangs, as proven by Col. Wagner and Mr. Sargent; when, it is respectfully submitted, that the letter of Anson Bangs was, under the circumstances, the best evidence of a

Columbia, November and December, 1857.

contract, and it should, at all events, have been submitted to the jury, to inquire and determine what the contract was.

6. Because his Honor charged the jury that the contract had been complied with by plaintiff, as to its general scheme, referring to a diagram offered in evidence by plaintiff, without giving it to the jury to determine what the contract was, whether it was best specified and illustrated by the said diagram, or the letter of Anson Bangs, before mentioned, and whether the contract had been complied with or not.

7. Because his Honor charged the jury that the verdict should be for plaintiff, and for a sum not exceeding four thousand seven hundred and forty-nine dollars, nor less than one thousand three hundred and fourteen dollars, when it is respectfully submitted, that under the pleadings and proof the verdict might have been for defendants; and if for plaintiff, should have been for a less sum than one thousand three hundred and fourteen dollars.

8. Because the sum found by the jury against the defendants is excessive, not warranted by the testimony, and works a great injustice and wrong to defendants.

Reed, Perry, for appellants. The action should have been in the name of the copartnership, and by the copartners. At all events Gaillard had a direct pecuniary interest in the result of the suit, and was therefore an incompetent witness to testify. *Grace vs. Smith*, 2 Bl. R. 998; *Dod & Dod vs. Halsey*, 16 Johns. R. 34; *Simpson vs. Felts*, 1 McC. Ch. 213; *Benson vs. McBee & Alexander*, 2 McM. 91; *Bartlett vs. Jones*, 2 Strob. 471; *Pierson vs. Steinmyer*, 4 Rich. 309; *Holliday vs. Daggett*, 6 Pick. 359. Private arrangements by one partner for his separate benefit, are not valid. *Ramsey & Taggart*

Sloan vs. Bangs & Co.

vs. *McBride & Passey*, 4 Strob. 14; Story on Part. 354; 1 Chit. Pl. 11; Gow on Part. 13, 16.

Harrison, McGowan, contra.

The opinion of the Court was delivered by

O'NEALL, J. The question mainly relied upon in this case is the incompetency of W. H. D. Gaillard, a witness on both issues. On the first, that of the plea in abatement, there can be no doubt that he was competent, when we look at the way in which he was presented. Because he was alleged to be Sloan's copartner was certainly no reason, why he was to be excluded. To show his interest the defendant examined him, on his *voir dire*, and he stated, "that the firm of W. H. D. Gaillard & Co., consisted of himself and the plaintiff Sloan. But that the firm made no contract with the defendants. They made the carts for Sloan. He, Gaillard, refused to have anything to do in the contract with Bangs & Co. Sloan after his return from the North, gave the firm an opportunity of making a part of the carts. Sloan he said had paid the company in full. He (witness) has nothing to do with the case." This is his precise examination upon the *voir dire*, which I have taken from my notes, so that the question of incompetency might be better understood, than from the mass of his proof, as set down in my report. Beyond all doubt, he could not be excluded from that examination. When sworn, in chief, if there were any indication of interest, or bias, such went to his credit, and of that the defendants had the benefit before the jury, who notwithstanding these, and every other fact relied upon by the defendants, found, that he was not the partner of Sloan in the contract with Bangs & Co.

On the second issue, that in which the plaintiff went to the jury to recover as a sole contractor, Mr. Gaillard when presented as a witness could not be challenged as a copartner,

Columbia, November and December, 1857.

for the verdict concluded that matter; but still the question was first presentable, had he an interest in the event of this suit? and here again, he was examined touching his interest, and he said, "the damages here will not fall upon him; if the carts as manufactured produce loss, then the shop would loose, otherwise he would have a share of the profits." This short note of his testimony, must be explained before we can understand it. He and his firm were sub-contractors at first, for a part, and then for all the carts, under Sloan. He had affirmed that Sloan had settled with him for his part of the job. The words which he used meant, that if the workmanship and materials for the carts, cost more than the stipulated price, he as one of the partners in the shop would lose *pro tanto*: if the price exceeded the workmanship and materials, he would gain *pro tanto*. This was no interest in the suit. For, let Sloan gain or lose, he was liable to pay Gailliard & Co. the contract price. Indeed he had already done it, by giving Gailliard his note for his share. It was no objection to his competency when asked,—whether he would enforce that note, if Sloan lost this suit? he said he did not know what he would do. Legally he could enforce the note,—as an act of friendship he might forgive it.

There was nothing therefore to exclude him in the beginning, and when examined on all facts of the case, I think there was nothing to show he had any interest in the event of this suit.

The parties (defendants) here again, had not only the benefit of urging upon the jury the various facts showing his participation in the manufacture of the carts, as affecting his credit, but again they put to the jury the question, whether, it had not been shown that Sloan was not a sole contractor with Bangs & Co., but that in fact he and Gailliard were joint contractors, (although not partners), and that question was again fairly and distinctly submitted to the jury, and upon it a second verdict was found for the plaintiff. How can it be

Sloan vs. Bangs & Co.

that against Gaillard's oath, and against two verdicts, we can be called upon to declare his testimony to be incompetent? I am sure I cannot, and of that opinion is the Court. The other grounds relate to the facts—upon which the finding of the jury is much apter to be right, than any *guess* of this Court would be.

The motions on both issues are dismissed.

WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motions dismissed.

Columbia, November and December, 1857.

FRANCES ANN LEGER *vs.* DANIEL KENNEDY DOYLE.*Sheriff—Sheriff's Sale—Conveyance—Registry—Recording—Cases approved.*

Sale by a sheriff in 1826 under a levy of land made four years before by his predecessor, sustained.

An ex-sheriff may buy land sold under a levy which he made when he was in office.

The declarations of a person in possession of lands, made during his possession and before controversy, are admissible to shew that his possession was not adverse:—and the want of adverse character in the possession, both prevents his acquisition of title under the statute of limitations and rebuts presumptions of title, which lapse of time might have raised in his favor.

When a sheriff sells land under *fi. fa.*, his deed of conveyance and not the contract made by the bidding, transfers the debtor's title, and no relation back will be had to give priority to the conveyance.

A previous conveyance of the land, not registered within the prescribed time, but registered in the interval between a sheriff's sale and his conveyance, will not under the Registry Acts be postponed to the sheriff's conveyance.

The lapse of twenty years between the date of the previous conveyance and its registration, where the debtor has remained in possession acknowledging the rights of others under the conveyance, will not of itself make the conveyance fraudulent, or ineffectual either against the debtor himself, or against a purchaser at sheriff's sale, whose conveyance was executed after the registration of the previous conveyance, although the sheriff's sale preceded the registration.

Under *Steel vs. Mansell*, 6 Rich. 437, the registration of a conveyance registered after six months, has no relation back in determining the order of priority under the Registry Acts, but takes affect from the date of the registration to defeat all subsequent conveyances.

BEFORE WITHERS, J., AT DARLINGTON, FALL TERM,
1857.

The report of his Honor, the presiding Judge, is as follows:

Leger vs. Doyle.

“The action was trespass to try title. The plaintiff claimed under a deed from the sheriff, made and delivered in 1850, but the sale, in pursuance of which the deed was executed, was made by the sheriff in 1848. After the *sale* and before the *conveyance* to the plaintiff, about a year, to wit: in 1849, the defendant's deed was recorded; and I supposed that *Steel* and *Mansell* made this recording sufficient notice of a prior conveyance, and so held. The prior conveyance thus recorded in 1849, was dated in 1829, and was one from the then sheriff, *Ingram*, to Peter C. Coggeshall, for a portion of the land now in dispute, not all, nor (I believe) the major part; and the said deed was made to Coggeshall by *Ingram*, in virtue of a sale by him to Coggeshall in 1826, and that sale was in pursuance of a levy by Samuel Bacot, sheriff, made in 1822, under which *Ingram* sold to Coggeshall. Another parcel of the same land, now in dispute, was levied on at the same time by Bacot, and sold by *Ingram*, sheriff, in 1826, to Samuel Bacot, conveyed to him in 1832, and that conveyance was recorded within six months. All the sales were made under executions against Daniel Doyle, whose title each party claimed.

“Overruling the propositions for the plaintiff, arising out of these facts, I held: 1st. That the levy by Bacot superseded the necessity to return the *fi. fa.* as the law stood before 1827. and was good authority for his successor, *Ingram*, to sell. 2nd. That Bacot, though he had made the levy in 1822, as sheriff, could lawfully buy from *Ingram*, sheriff, in 1826. So much for the 1st, 3rd and 4th grounds of appeal.

“I shall have to make a laborious statement to render intelligible the other grounds of appeal.

“Daniel Doyle lived and died on the land in dispute. He resided there forty or forty-five years, within the memory of witnesses. Notwithstanding the sales by *Ingram*, he continued to reside there. Kennedy Doyle, the defendant, lived there also with his father from his birth to the present day,

Columbia, November and December, 1857.

except that he made a crop one season with a neighbor, still visiting on leisure days the homestead. While a minor, Daniel, the father, sometimes rented a portion of the land to others, and the rent, in kind, was rendered by leaving it as his crib, or the one he used. The defendant cultivated the land from year to year, unless that be excepted in which, as already stated, he made a crop with a neighbor. Daniel, the father, and Kennedy, the son, seemed to treat the land as common property, so far as the observation of others went. Kennedy sometimes rented some of it. He was of age some twenty years ago. It was at a point of the trial, showing this state of things (described to be sure in very general terms,) that the plaintiff sought to prove *declarations* of Daniel Doyle in favor of his title, on the grounds that he had been long in possession, apparently absolute owner: that the presumption, *quoad* Kennedy, the defendant, arose, that his possession was under his father, in subordination to his title. With hesitation, and overruling the defendant's objection, I indulged the plaintiff in that course of testimony.

"When the defendant's case was heard, it appeared that Coggeshall had conveyed the land he bought to Ruffin in 1832, and Ruffin, in the same year, to this defendant and two of his brothers; neither of which deeds were recorded: that in 1838, a case was pending against Daniel Doyle by the heirs at law of Samuel Bacot, involving the portion of the land bought by Bacot in his lifetime, and in that year a paper was executed between King, son-in-law and administrator of Bacot, and Daniel Doyle, whereby Doyle engaged to pay, on or before a day in 1841, a sum certain to the heirs of Bacot, or to King for their use, and on the payment of the money King agreed to convey the land to James P. Doyle, and this defendant: Daniel Doyle stipulated that he had no title to the land, except what was expected to be derived from that contract. Upon the execution of that contract, the action pending was to be dropped. Some payments have

Leger vs. Doyle.

been made by the defendant under and by virtue of this agreement.

"The plaintiff contended that Daniel Doyle had reacquired title as against both purchasers from Ingram by adverse possession, and she relied on his declarations and acts of dominion to maintain that ground, as well as upon certain declarations, on three occasions, by this defendant, once saying that the land was his father's; again, that the line of Railroad divided his father's from a neighbor's land; and a third time, (when he and his father had fallen out and the latter had offered violence,) that he had cloaked that property long enough. On the other hand many declarations of Daniel were introduced in evidence denying title to the land in himself, or claim of title.

"As arising out of such developments, I held that Daniel's declarations, verbal and in writing, were receivable in reply to such as plaintiff had adduced; that they were legitimate upon the question of adverse possession: that while this plaintiff might cover herself with the rights of creditors of Daniel, yet that if Daniel acknowledged himself to hold, not for himself but in subordination to another's title, that the plaintiff, a purchaser at sheriff's sale, and all other creditors were properly confronted with such evidence when they set up adverse possession. The question of adverse possession, by Daniel Doyle, was submitted to the jury with such instructions as are not excepted to. I presume it would be difficult to make that point for the plaintiff or any other creditor, after what Doyle did and said in 1838, in his transactions with King. Doyle was greatly embarrassed by executions all the time, and it was not difficult to see that while he wished to remain on the premises, he did not wish to have any such interest in them, as the sheriff could sell.

"The plaintiff obtained her judgment against Doyle, on a note given by her mother for two hundred dollars to her, while the mother was *feme sole*: she afterwards married

Columbia, November and December, 1857.

Doyle—they lived a short time together, and the plaintiff sued mother and husband, obtained her judgment, and bought the land at a sale under her own execution, there being various other judgments against Doyle at the same time. The jury found for the defendant.”

The plaintiff appealed, and now moved this Court for a new trial, on the grounds :

1. Because, it is respectfully submitted, his Honor erred in holding that the recording of the deed of sheriff Ingram to Coggeshall, *after the sale of the land* in dispute by sheriff Huggins, was notice to plaintiff of said deed, and that therefore the case of *Steel vs. Mansell*, 6 Rich. 437, was conclusive on that point against the plaintiff's claim in this case.

2. Because the declarations of Daniel Doyle should not have been received in evidence *in favor of the defendant*, said Doyle having never relinquished possession, and judgments and executions all the while hanging over him, he receiving the rents and profits, and because such declarations of said Doyle, *were not in reply* to any declarations of said Doyle, brought out by the plaintiff.

3. Because the sale to Bacot by sheriff Ingram, under a levy *made by said Bacot as sheriff*, was void, and therefore sheriff DuBose's deed should have been excluded.

4. Because both sales by sheriff Ingram were void, being made without lawful authority.

5. Because the paper signed by James King and Daniel Doyle should have been excluded, but being admitted, the jury should have been instructed that such a transaction was a fraud *per se* on Daniel Doyle's creditors, and further that

Leger vs. Doyle.

Daniel Doyle under its terms, being tenant of James King and those whom he represented, the payments of money by defendant thereunder to King, was a distinct recognition of the tenancy of his father, which estopped him from denying that the said Daniel Doyle was his landlord, without first surrendering to the plaintiff the possession of the premises, the heirs of Bacot not having come in to defend under the rule of Court.

6. Because, in addition to the above, the uncontradicted disclaimers by defendant of title in himself, (except by the declarations of Daniel Doyle) and of his own repeated declarations of title in his father, estopped defendant from proving title out of his father, and that therefore his Honor erred in holding that paper title in any body other than Daniel Doyle was enough to defeat plaintiff's action.

7. Because the transaction between King and Daniel Doyle though it may have been good as between them, did not affect the rights of creditors, prior or subsequent, who had no actual notice thereof, of which there was not a pretence in this case, and that therefore Daniel Doyle's adverse possession, prior to the date of that transaction, retained its character as to the plaintiff and other judgment creditors, and that therefore his Honor erred in ruling that Daniel Doyle's possession lost its adverse character by the said transaction.

8. Because, in a case like this, a purchaser at sheriff's sale acquires the rights of any creditor, to whose execution the sheriff's authority may be referred. Notice of defendant's rights had by the plaintiff, is of no consequence, if she or any other creditor, at the time of extending the credit to Daniel Doyle had not such notice.

9. Because, even if the recording of the deed of Ingram to

Columbia, November and December, 1857.

Coggeshall should be held as notice to plaintiff, it can be held to extend only to that deed, and not to the deed of Coggeshall to Ruffin, and of the latter to the three sons of Daniel Doyle, which have never been recorded; hence Daniel Doyle's possession from date of Ingram's deed, so far as creditors are concerned, must be regarded as adverse, as against Coggeshall, and of course against those claiming under him.

Spain, Norwood, for appellant.

Moses, Inglis, contra.

The opinion of the Court was delivered by

WARDLAW, J. This Court approves the Circuit decisions, which have been brought under review here.

The sale by Ingram, sheriff, under a levy made four years before by Bacot, his predecessor in office, is sustained by the authority of the case of *Gassoway vs. Hall*, 3 Hill, 289.

The purchase by Bacot after the expiration of his term of office, from sheriff Ingram, of land sold under a levy which Bacot, when sheriff, had made, was not contrary to the letter or the reason of any statute which has been passed in this State to prevent a sheriff from buying directly, or indirectly, at his own sale. See Act of 1839; 11 Stat. 38, sec. 59; Act of 1823, 6 Stat. 213; Act of 1791, 7 Stat. 263, sec. 8.

The regular turning over of the execution by Bacot to his successor, and the regular sale by Ingram at a proper time and place, will, in the absence of proof to the contrary, be presumed.

The declarations of Daniel Doyle, made during his possession and before controversy, were admissible to show the character of his possession, upon the question whether it was adverse. As to actual fraud, which has been imputed, the verdict

Leger vs. Doyle.

affords patent contradiction; but it is not unimportant to remark that the old executions against Daniel Doyle, which existed in 1826, may all, in the absence of any opposing evidence, be presumed to have been satisfied, before the plaintiff obtained her judgment against him in 1849; and that no execution against him between these old ones and the plaintiff's was shown. Concerning the presumption of a conveyance from Coggeshall, or some person claiming under Coggeshall, to Daniel Doyle, which the lapse of twenty years, between the date of the conveyance to Coggeshall and the time of its registration has been thought to raise, it may be remarked that the same want of adverse character in Daniel Doyle's possession, which prevented his acquisition of a title by the statute of limitations, also rebutted presumptions of title in him. The plaintiff claims under him, and can have no rights superior to those he had.

The main question in the case is that which relates to the registration of the deed of conveyance from sheriff Ingram to Coggeshall, and this question affects only a portion of the land sued for.

Bacot, sheriff, levied in 1822; under this levy Ingram sheriff sold to Coggeshall in 1826; and under this sale a sheriff's title was executed and delivered to Coggeshall in 1829.

The plaintiff obtained her judgment in 1849; under it sheriff Huggins, after levy sold to the plaintiff Nov., 1829, and executed to her a sheriff's title in Feb., 1850. Between the sale to the plaintiff and the execution of the conveyance to her, to wit, December 17, 1849, the old conveyance to Coggeshall was registered. If that conveyance is valid, it shows a title out of the plaintiff, although subsequent conveyances under it have never been registered; and the plaintiff contends that, if all other objections to this old conveyance shall prove unavailing, the registry Acts will make it in-

Columbia, November and December, 1857.

efficient against her, a subsequent innocent purchaser without notice.

The questions thus presented under these Acts are almost identical with those that were considered in the case of *Steel vs. Mansell*, 6 Rich. 437, which was decided in the Court of Errors, and which we will suppose the readers of the remarks now to be subjoined have carefully examined. The distinctions between that case and this are, first, that there the older deed was registered within four years from its date, here after twenty years from its date: second, that there the registration of the older deed preceded the sheriff's sale under which the junior deed was made, though it followed the judgment under which that sale was made; but here the registration of the older deed was subsequent to the sheriff's sale, at which the plaintiff purchased, although it preceded the execution of the conveyance to her.

The first distinction we dismiss by simply suggesting, in addition to what has been before said about fraud and presumptions, the inquiry whether Daniel Doyle could, under the circumstances that existed, have resisted the deed to Coggeshall, as obsolete, fraudulent, or otherwise void. If he could not, that deed, even without registration, was valid against him and all the world, except such creditors and purchasers as are protected by the registry Acts; and when registered, was not afterwards liable to be defeated, for previous neglect of any prescribed time, by rights subsequently acquired by a purchaser.

The other distinction may seem at first to be more important. It is asked, shall a purchaser at a sheriff's sale be defrauded by an old conveyance, of which he had no means of notice at the time of his purchase? And it is said, if the contract to buy had been made with a private individual, a defect of title subsequently discovered might have been urged against the completion of the contract; but under the rule of *caveat emptor*, applicable to sheriff's sales, the purchaser at

Leger vs. Doyle.

such a sale is obliged to pay his bid, and should be saved from the unjust defeat of his expectations by matter supervening his contract.

It might be answered that where the purchaser at a sheriff's sale is the plaintiff in execution to whom the proceeds of sale are payable, and the defendant in execution has contributed to the perpetuation of an actual fraud, by concealment of papers or other means, the purchaser would not be bound to give the defendant the benefit of the fraud by completing the bargain, which was made by his bid, (See *Minter vs. Dent*, 3 Rich. 207; *Herbemont vs. Sharp*, 2 McC. 264; *Towles vs. Turner*, 3 Hill, 182.) But here actual fraud has not been found, and the bargain of the purchaser having been completed she claims to have acquired a paramount title. By the sale, as it is called, she acquired no legal title, but only such equitable interest as exists under every contract to buy. The subsequent conveyance made to her by the sheriff would, if she had gone into possession before it, have shielded her from responsibility for mesne profits, by relation back to the sale: (*Kingman vs. Glover*, 3 Rich. 86.) for such would be the effect of any contract to buy, under which possession was held, where there was a right to claim immediate execution of the contract, and execution followed. But up to the very time when a conveyance is delivered by the sheriff to one who has purchased land at a sheriff's sale, the title, which the defendant in execution had at the sale, remains in such defendant, the power to convey which the law vests in the sheriff being yet unexecuted. (*The Bank vs. S. C. Man. Co.*, 3 Strob. 192.) The registry Acts embrace deeds and conveyances, not parol contracts to buy, written or unwritten: and a sheriff's conveyance is subject to the provisions of those Acts in like manner as a conveyance from a private individual. (*Massey vs. Thompson*, 2 N. & McC., 105.) If an honest conveyance, made by a debtor before judgment against him, should be registered at some time

Columbia, November and December, 1857.

within six months from its delivery, in vain would a subsequent purchaser oppose to it his rights as purchaser without notice, even although he had purchased at sheriff's sale under a judgment obtained after its delivery, and the conveyance to him, as well as the sale, had preceded its registration. The registration in such case would, under the Act of 1785, relate back to the day of delivery, because it was made within the prescribed time. The registration of the old deed now in question, not having been made within the prescribed time, can have no relation back; but taking effect only at the time it was made, it then became notice, and gives to the deed priority over all conveyances subsequently made.

If the plaintiff had paid her bid, by giving a receipt to the sheriff or otherwise, and had taken the conveyance from him on the day of sale, she could not have been hurt by the registration within six months thereafter, of any conveyance not executed within the six months next preceding, provided the conveyance to herself had been duly registered within six months. To her own tardiness, rather than to the slowly exerted diligence of somebody claiming under the conveyance to Coggeshall, is to be ascribed the priority which that conveyance has obtained. The law contemplates the sale by the sheriff, the payment of the purchase money, and the conveyance to the purchaser as one continuous transaction:—interruption and delay cause embarrassment and irregularity, but they are so frequent that various special provisions have been made to meet them. This case, however, illustrates forcibly the danger to a purchaser which attends them. The same result might possibly have happened if the delay had been only for an hour:—so any subsequent conveyance might possibly be defeated by a prior one registered within six months from its execution and within an hour intervening between a search in the register's office and the execution of the subsequent one:—or, in any case, where the order of

Leger vs. Doyle.

precedence is fixed in conformity with the order of registration, a very short interval of time might be decisive of conflicting rights: but in every case the risk is increased in proportion as the time is extended. Here the plaintiff delayed only six weeks: but if that comparatively short interval between the sheriff's sale and his conveyance shall be disregarded, and the plaintiff be protected against occurrences of the meantime, what shall be the limit of the like indulgence in other cases? The legislature has allowed sheriffs, and their successors, for an indefinite time, to complete the contracts made at their sales. If we do not invariably look to the conveyance and that only as the transfer of title, without regard to the time of the contract, we will in effect enact that the conveyance is only formal, and that all its important uses may be served before it is made. The motion is dismissed.

O'NEALL, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, November and December, 1857.

JANE BRUCE *vs.* EPHRAIM PERRY.SAME *vs.* E. M. PERRY.SAME *vs.* LEWIS W. MORGAN.*Renunciation of Inheritance—Evidence.*

A married woman's renunciation of her inheritance, if made within seven days from the execution of her deed, is null and void.

Where the magistrate's certificate declares that the seven days had expired, and the dates show the contrary, *prima facie*, the dates will be taken to show the true time, and the *onus* will be on the purchaser, to show that the seven days had in fact expired, before the renunciation was made.

BEFORE MUNRO, J., AT PICKINS, FALL TERM, 1857.

These were actions of trespass to try title. The land in dispute was granted to the plaintiff, while she was a *feme sole*. She intermarried with John Bruce, and then joined her husband in conveying the land to James McKinney, under whom the defendants claimed. The conveyance from the plaintiff and her husband to McKinney, bore date the 18th August, 1823, and her renunciation of inheritance bore date the 19th August, 1823, the magistrate's certificate declaring that it was made within the seven days. The plaintiff's husband having died, these actions were brought for the recovery of the land.

His Honor instructed the jury that the renunciation was void, and could not operate as a bar to the plaintiff's right to recover. The jury, however, thought otherwise and found verdicts for the defendants.

Bruce vs. Perry.

The plaintiff appealed, and now moved this Court for a new trial, on the ground:

That the renunciation of inheritance by the plaintiffs, having been made on the sixth day after the execution of the deed by herself and husband, was void, and did not divest the plaintiff of her title; that the jury were so instructed, and erred in finding against the instructions; and that the verdicts were contrary to law, and should have been for the plaintiff in each of the cases.

Wilkes, Reed, for appellant, cited and relied upon the Act of 1795, 5 Stat. 257; 2 Dwar. on Stat. 611, 646; Thorn. on Con. 27; 2 Tucker's Com. 259; *Elliott vs. Piersall*, 1 Peter's, R. 328; 12 Peter's R. 345; *Watson vs. Bailey*, 1 Bin. 407; *Jackson vs. Caines*, 20 Johns. R. 301; *McIntrie vs. Ward*, 5 Bin. 296; *Jackson vs. Stevens*, 16 Johns. R. 114; 2 Dwar. on Stat. 672; *Williams vs. Burgess*, 12 Ad. & E. 638, 472; 4 B. & A. 522; 8 Ad. & E. 173; 6 M. & W. 49; 1 Bail. 611; *Bigelow vs. Wilson*, 1 Pick. R. 485; 1 Strob. 552; *Brown vs. Spann*, 2 Mill, 240; *Harvin vs. Hodge*, Dud. 23.

Perry, contra. The authorities all show that the true date of a transaction may always be shown—the date given to the instrument being only evidence and not conclusive. The question is then one of fact for the jury to decide. The evidence here, to show that the date was wrong, is the magistrate's certificate which, if not conclusive, was at least sufficient, *prima facie*, and left the *onus* on the plaintiff. He cited, 3 Rich. 220; 2 McC. 213; 4 Strob. 6; 5 Rich. 39.

The opinion of the Court was delivered by

WITHERS, J. The defendants, in these cases severally, sought to bar the recovery of the plaintiff, to whom while *sui juris*, the lands were originally granted, by exhibiting a

Columbia, November and December, 1857.

conveyance in which she, as a married woman, had joined her husband, accompanied by what was urged as a valid release of inheritance. The date of such release (or certificate of it) being compared with the date of the conveyance showed that the requisite number of days, being seven, had not elapsed from the execution of the deed by husband and wife, but only six. The Circuit Court ruled, that such title exhibited a renunciation of inheritance invalid, and worked no bar or estoppel to the plaintiff who is now discoverd. The jury disregarded the instruction and ruling of the Court, and found a verdict for the defendants. The motion is to set aside the verdict and for a new trial.

Nobody doubts that the renunciation of a married woman before the expiration of seven days from the time when she joins her husband in a conveyance of her land is wholly void as against her when in a condition to assert her original title. But it is contended, that, inasmuch as the certificate of the magistrate declares that seven days had expired, this is to be taken as contradicting the dates which are inconsistent with it, and is to be imputed to the plaintiff as an estoppel, *prima facie*, and thus throw upon her the burthen of proving that seven days, *a quo*, had not expired.

To ascertain upon whom the burthen of showing any mistake rested, it is enough to consider, that the defendants produced the paper that disclosed the incongruity,—that, on its very face, showed the conveyance to have been executed on the 13th and the renunciation on the 19th of August, 1823. Surely it does not need argument or authority to show, that any ambiguity, or repugnance, or insufficiency or mistake, in language or figures in an instrument of evidence must be explained by him who offers it, and to whose success it is necessary, in cases where the adversary party who may have contributed to the question raised, or whose language raises it, was, at the time when the action was performed or the language used, under so complete a disability as that of a

Bruce vs. Perry.

feme covert; one who as at common law is eminently disabled to join effectually in our forms of conveying the title to realty.

This plaintiff being a married woman on the 19th of August, 1823, was under the dominion of her husband, in the jealous apprehension of the law, in any declaration she could make, touching a renunciation of her inheritance, until the proper time had elapsed. Before that time, on the sixth day, she may have declared what the certificate affirms, but she was not a free agent to make the declaration, or to confirm what had been done in the premises, within seven days. She could do or say nothing, as one *quasi* discoverte except in circumstances corresponding with those prescribed by the enabling statute, and the efflux of the specified period was a material matter. There is not any question that the defendants may, if they can, show that the seven days had expired, the conflicting dates to the contrary notwithstanding. But until that be done, whatever hardship may be supposed to be visited upon them, the plaintiff cannot be disseized of her freehold, or deprived of her land. A new trial is ordered in the several cases stated.

O'NEALL, WARDLAW, WHITNER, GLOVER AND MUNRO,
JJ., concurred.

New trial ordered.

Columbia, November and December, 1857.

JAMES M. CARTER vs. ROBERT A. KING, ET AL., EXECUTORS
OF WILLIAM KING.

*Single Bill—Consideration—Testamentary Paper—
Nudum Pactum.*

An instrument under seal, in form a single bill, given and delivered by a grand-father to the husband of his grand-daughter, and intended as an advancement, payable one day after date, but with right of collection postponed until donor's death:—*Held*, valid between the parties, and binding as an irrevocable contract upon the executors of the donor.

An instrument intended to take effect at the donor's death, but not having the formalities of a will, will not be held testamentary and therefore void, if it can operate in some other character which appears to have been intended.

It is no objection to a bond or single bill, or even, it seems, to a promissory note, that it is made payable at the obligor's, or drawer's death.

The doctrine of *nudum pactum* is wholly inapplicable to sealed instruments.

A defendant may always show in defence, in an action upon any instrument, *failure* of consideration either entire or partial, but where the action is upon an instrument under seal, as a bond or single bill, he cannot show that it was without any consideration at all—a consideration not being necessary to the validity of the instrument as between the parties themselves and their representatives.

Creditors may, after the death of the obligor, show an entire want of consideration for the purpose of having the payment of the bond or single bill postponed to contracts founded upon valuable consideration; *semble*.

A single bill payable one day after date with right of collection postponed until the obligor's death, bears interest from the day after its date.

BEFORE O'NEALL, J., AT ANDERSON, JULY, EXTRA TERM,
1857.

This was an action of debt on a single bill, a copy of which is as follows:

Carter vs. King.

"One day after date I promise to pay James M. Carter, the sum of one thousand dollars, it being a part of his wife's part of my estate, which note will be collected after my decease.

"Witness my hand and seal, this 30th day of November, 1846.

WILLIAM KING, [L. s.]

"Test: JAMES G. RICHARDSON."

The subscribing witness testified to the execution of the instrument, and that the deceased said, he gave the note, that his grand-daughter, who was the plaintiff's wife and had been raised by him, should have a part of his estate.

The plaintiff here closed, and defendants moved for a non-suit on the grounds:

1. That the instrument was without consideration. And
2. That it was testamentary. His Honor overruled the motion.

The genuineness of the instrument and the character of the subscribing witness, were then assailed, and upon these points a number of witnesses were examined both for the defence and for the plaintiff. One of the witnesses testified, that he had seen the instrument in the possession of the plaintiff in 1846, which was long before the testator's death.

His Honor instructed the jury, that if they came to the conclusion that the paper was the genuine deed of the testator, the plaintiff was entitled to recover, and they should find for him the amount of the note with interest from the day after its date. They found accordingly.

The defendants appealed and now moved this Court for non-suit, and failing in that motion then for a new trial, on the grounds:

Columbia, November and December, 1857.

For Non-suit.

1. Because the paper sued on was without consideration, a mere *nudum pactum* and void, and contained plenary evidence on its face of the fact.

2. Because an undertaking to pay money after one's death, in consideration of a distributive share of such person's estate, is an undertaking without consideration, is testamentary in its character, and void, whether it be under seal or without seal.

For a New Trial.

1. Because, for the reasons, stated in the above grounds, the plaintiff was not entitled to recover, and the verdict should have been for the defendants.

2. Because, even if the plaintiff was entitled to recover, his Honor erred in instructing the jury to allow interest one day after the date of the paper, instead of from the death of the testator, as to the time of which there was no proof, and the verdict is wrong in that particular at least.

3. Because the paper sued on was not genuine, but fictitious and fraudulent, as was proved on the trial, and the verdict was against the evidence.

Wilkes, Sullivan, for appellants. The instrument sued on, if viewed as a contract, is voidable, because it was without sufficient consideration. The doctrine of *nudum pactum* is said to be applicable only to parol or unsealed contracts, but that only means that in suits upon such instruments the plaintiff must aver and prove a valuable consideration; whereas, if the instrument is under seal, the burden is shifted to the defendant, and he must aver want of consideration and prove it. *Mattock vs. Gibson*, 8 Rich. 437. That

Carter vs. King.

is the true doctrine. The consideration may always be inquired into no matter what may be the form or character of the instrument. The instrument sued on in this case is therefore voidable, even though payment had not been postponed until the death of the donor. But payment here was postponed until that time, and the instrument is clearly testamentary. The promise is executory, the paper itself vests no title in the donee—it is a mere gift *in futuro*, which is nothing more than a promise to give, and is void as a will for want of proper attestation. They cited, Story on Prom. Notes, § 184, 187; *Hall vs. Howard*, Rice, 310; *Fink vs. Cox*, 18 Johns. R. 145, 149; *Wiggins vs. Vaught*, Chev. 93; *Priester vs. Priester*, Rich. Eq. Cases, 26; 1 Wms. on Ex'ors, 59; 2 Ves. Jr. 230; 2 Ves. Jr. 204, note 2; 19 Conn. 18; 5 Bin. 490; 2 Hagg. 235.

Harrison, McGowan, contra. The cases referred to where similar gifts were held invalid were upon promissory notes, and the consideration of that class of instruments may always be inquired into as between the original parties. Here the action is upon a sealed note and is against executors, who represent the donor, and cannot question its validity if he could not. If it can only operate as a testamentary paper then it is void for want of three witnesses. But it is not necessarily testamentary, because it is voluntary, and because payment is postponed until after donor's death. A voluntary gift of a negro, if intended to be irrevocable, is valid, though the donor reserves the use to himself during life; and why may not such a gift of money also be valid, if intended to be irrevocable? Such instruments have been held valid in England and binding upon the executor. 5 T. R. 381; 3 T. R. 392; 3 Atk. 539; 1 Atk. 292; 3 P. Wms. 222. When no witness was required to a testament, almost any paper to be performed at the maker's death, might be proved as a testament, *ut res magis valeat quam*

Columbia, November and December, 1857.

percat, if it could not operate in some other character; and now whenever such an instrument cannot be admitted to probate in the Court of Ordinary because not legally attested as a will, the Court should hold it valid as an instrument *inter vivos*, if it can possibly so operate. Then is want of consideration a fatal objection to a sealed note or bond? It is not. Such an instrument requires no consideration. The defendant may show in defence that the consideration was illegal, or he may show that it has failed, but he cannot show an entire want of consideration and that is the attempt here. They further cited 2 Blac. Com. 445; 1 Com. on Con. 9; 6 Johns. Ch. 806; 1 Ves. Sr. 514; 2 Brok. 155.

The opinion of the Court was delivered by

WARDLAW, J. The verdict has established that the paper, subject of this suit, is a genuine instrument, which William King, in his lifetime, signed, sealed and delivered to the plaintiff.

The terms of the instrument show that it was probably intended as an advancement to the husband of a granddaughter, who, if the maker of the instrument had died intestate, would have been entitled to a distributive share of his estate. Certainly, there appears to have been no consideration moving the maker, besides blood and affection, and the instrument may be treated as altogether voluntary. It seems to promise payment one day after its date, but plainly restricts collection before the maker's death. It then contemplated payment by his executors or administrators, and the important question of the case is whether it is not testamentary. If testamentary, not having been attested by three witnesses as our Act of 1824 requires all wills of personalty to be, it is void.

In argument for the plaintiff, reference has been made to cases, where by deed, a gift was made of negroes, with the

Carter vs. King.

reservation by the donor of a right to retain and use them during his life : such as *Alexander vs. Burnet*, 5 Rich. 189, and *Jaggers vs. Estes*, 2 Strob. Eq. 343 :—and it has been supposed that in this case as in those there was the immediate gift of a present interest whose enjoyment was postponed. But in any of those cases the interest, which was vested in the donee, would have enabled him, at the donor's death, to take possession of the negroes without the assent of the donor's executor ;—whereas in the case before us, even if the plaintiff, to whom the instrument in question was given, could have assigned his interest, resort to the executors for payment could in no way have been avoided ; and there is therefore more plausibility in saying that this instrument, although in form a deed, was only a direction for executors to pay,—a mere ambulatory expression of what the maker of it, at its date, intended concerning the disposition to be made, after his death, of a portion of his estate.

We must then look further. There is no prescribed form for a will, and cases have occurred, in the Ecclesiastical Courts of England, of papers very unlike ordinary wills, which have been admitted to probate. In *Masterman vs. Maberly*, 2 Hagg. 235, Sir John Nicholl mentions instances of Scotch conveyances, deeds of gift, bonds, promissory notes, assignments, endorsements, receipts, letters and marriage articles : and he holds that a paper not intended to be a will, but an instrument of a different shape, if it cannot operate in the latter character, may operate in the former. This, it will be observed, was held under a law which required no formality in the execution of a will of personalty ; and in applying it to our law, we may say that if an instrument can operate in some other character, which appears to have been intended, it will not be held testamentary ; and especially not, when it has not the requisite formalities of a will, and holding it testamentary would be declaring it void.

Columbia, November and December, 1857.

On the other hand, we must acknowledge that when an instrument has the essential nature of a testamentary disposition, in being revocable and inoperative until the death of its maker, it should not be allowed to prevail, according to its shape as an instrument *inter vivos*, merely because it cannot take effect as a will for want of due formalities. An irrevocable expression of intention should be aided, but the statutes concerning wills should not be evaded.

The delivery of the paper in question relieves it from the objections which were considered in the cases of *Disher vs. Disher*, 1 P. Wms. 204; *Newland vs. Gilham*, 1 P. Wms. 577; *Toner vs. Taggart*, 5 Binn. 490, and other cases cited in the one last mentioned.

That the payment was appointed to be made at the death of the obligor, is not, of itself, an objection to the paper's being considered an irrevocable obligation. Even promissory notes for valuable consideration payable at the death of the maker or of a third person have been held good. *Stra.* 1217; *Willes*, 393; 19 Conn. 18; 10 Adol. & Ell. 222:—and on bonds so payable many instances of recovery may be found. (3 Term, 372; 5 Term, 381; 8 Term, 488.)

The want of consideration is the objection which has been mainly urged on the part of the defendants.

In our case of *Hall vs. Howard*, Rice, 310, upon a paper much like the one now in question, which had been delivered by the maker in his lifetime, an action against his executors failed in 1889. That paper had the words "witness my hand and seal," but no seal being (as was thought) visible, it was sued on as a promissory note, and was held to be without consideration and void—"a mere naked revocable promise"—*nudum pactum*. We do not know what might have been the result there, if the plaintiff had treated the paper as a specialty, under the view that any blot may be a seal sufficient after the *apposui sigillum*, or that the accidental

Carter vs. King.

erasure of the seal may be presumed where the intention to seal is manifest. The case, under the head pertinent to the matter now in hand, is authority for the position that a promissory note is void between the original parties to it, when want of consideration has been shown. That position is well vindicated in another case, of circumstances somewhat similar, which was decided in our Court of Equity in 1831. *Priester vs. Priester*, Rich. Eq. Cases, 38.

But the paper now before us is not a promissory note, nor has it been so treated by the plaintiff. This action is debt on a specialty, and the single bill in suit is a bond without penalty—an obligation under seal acknowledging indebtedness—a covenant to pay according to stipulation. To such an instrument the doctrine of *nudum pactum* is wholly inapplicable. (Plow. 309.) The law gives no action on a parol promise, which is not sustained by a valuable consideration. (Chitt. on Cont. 27.) Ever since the case of *Pillaus vs. Van Minch*, 3 Burr. 1671, was overruled by that of *Rann vs. Hughes*, 7 Term, 350, the division of parol contracts, in regard to consideration, into written and unwritten, has been exploded. Bills of exchange and promissory notes, for reasons of commercial policy, are held so far to import a consideration, that, in suits on them, no consideration need be averred, and when they have been duly negotiated and are in the hands of innocent indorsees or bearers, want of consideration will not avail against them: but between the original parties they are like all other parol contracts, subject to the objection that there is no consideration, or none but blood and affection, and by proof of this the presumption of consideration which the signing of them creates, is rebutted. *Bremar vs. Singleton*, Harp. 211; 5 Barn. & Cres. 501.

A bond shown to be without consideration is thereby postponed in the distribution of assets to debts founded on valuable consideration, but still it is valid between the par-

Columbia, November and December, 1857.

ties and their representatives. (1 Atk. 292, 625; 3 Atk. 541; 3 Pr. Wms. 222; 1 Ves. Sen. 514.)

In the case of *Matlock vs. Gibson*, 8 Rich. 489, decided in 1832, there are words hastily used which seem to countenance the notion that sealing merely throws upon him who would object to a specialty the burden of showing that it had no consideration, and that this when shown is just as available against a bond as against a note of hand or other parol contract. These words are proper in their application to the subject then treated of, the right of a defendant, in an action on a bond, to show failure of consideration in defence; and to such subject they must be confined. Our Court has gone far in permitting inquiry into the consideration of a specialty, in defence of an action brought to enforce its obligation, and in permitting a defendant, for prevention of circuitry, to show an entire or a partial failure of consideration, or any damages growing out of the contract from which the specialty proceeded. But there is a great difference between the objection to an obligation, that the consideration which really moved it has failed, and the objection that it never had a consideration. If want of consideration appeared, the inference would be that, for that reason, it was put into such form, that the deliberation implied from the seal should stand in the room of consideration. How could any deed of gift, or covenant to stand seized ever prevail, if the same want of valuable consideration, which renders a parol promise void, would avail to defeat a specialty?

The Court is satisfied that the single bill in question was, when delivered, intended to be an irrevocable obligation, and that nothing which has been urged against it, requires that it should be prevented from operating in the character which was designedly given to it.

Upon the question of interest, it was a just construction of the paper to hold that although the payment was deferred

Carter vs. King.

till the obligor's death, one day after date was fixed as the time at which the obligee's right to the money should so far attach as to carry interest.

The motion is dismissed.

O'NEALL, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, November and December, 1857.

EDWARD HOPE *vs.* JOHNSTON & CAVIS.*Release not under seal—Nudum Pictum—Payment.*

- A. having the joint promissory note of B. & C., indorsed upon the note after it became due a receipt, not under seal, of one half the amount from B. "being his share in full of the within note, from the payment of which or any part thereof, I hereby release him":—*Held*, that B. was not discharged; that A. might maintain a joint action against him and C. for the balance.
- A release not under seal, in consideration of part payment in money of a debt past due, is no discharge of the balance—the release being without consideration.(a)

BEFORE MUNRO, J., AT SPARTANBURG, FALL TERM, 1857.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Jones, for appellant, cited *Chit. on Con.* 774; *Co. Lit.* 264; *Corbet vs. Lucas & Dotterer*, 4 *McC.* 323; *Story on Prom. Notes*, § 410; *Story on Con.* 689; *Shaw vs. Pratt*, 22 *Pick.* 308; *Walker vs. McCullough*, 2 *Green.* 421; *Harrison vs. Close*, 2 *Johns. R.* 449; 7 *Johns. R.* 209; 4 *Strob.* 14; *Story on Prom. Notes*, § 431, 435; *Story on Bills*, 437; *Bail. on Bills*, 365; 1 *Johns. Cases*, 131; 3 *McC.* 13; 8 *Mass. R.* 480; *Chit. on Con.* 747; 5 *East.* 232; 2 *Strob.* 205; 3 *Strob.* 36.

Wright, contra, cited 1 *Rawle*, 391; *Story on Prom. Notes*, § 435, 425, notes.

(a) In the English and American notes to *Cumber vs. Wane*, 1 *Smith's Lead. Cas.* 146, numerous authorities upon the subject of this decision may be found. In *Fullwood vs. Wilson*, at Sumter, June, 1856, Chancellor Wardlaw, in a circuit decree, states the general doctrine as follows: "A debt can be extinguished only

Hope vs. Johnston and Cavis.

The opinion of the Court was delivered by

GLOVER, J. The plaintiff's action was on a joint promissory note drawn by defendants, for one hundred and thirty dollars and seventy-five cents, and dated 8 March, 1852. A credit for forty-five dollars and six cents is endorsed, 17 June, 1853, and afterwards the following receipt was given.

"Received of W. B. Johnson, February 11th, 1857, sixty-three dollars and twenty-two cents, being his share in full of the within note, from the payment of which, or any part thereof, I hereby release him."

(Signed) "EDWARD HOPE."

A non-suit was ordered by the Circuit Judge on the ground, that this receipt operated as a release of the balance due on the note, and discharged the joint makers; and the motion in this Court, is to set aside the non-suit.

by accepting a security of a higher nature (*Mills vs. Starr*, 2 Ball. 360,) or by actual payment, or by release, or by some contract equivalent to release. Payment of money simply on a demand in money, amounts merely to payment *pro tanto*, and a receipt in full on such partial payment is not conclusive, and, as *adum pactum*, may be avoided on proof that payment in full was not actually made. Such receipt is a mere admission of the party, and like all admissions susceptible of explanation and disproof. *Pinnel's case*, 5 Co. 117; *Eve vs. Mosely*, 3 Stro. 203; *Boutwell vs. Harrison*, 4 Rich. Eq. 317."

Later cases appear to have engrafted some exceptions on the general rule. (1.) Where the demand is unliquidated and uncertain there the acceptance of a smaller sum will discharge the whole debt, though it should afterwards turn out to have been in fact larger. *Longridge vs. Dorville*, 5 B. & A. 117; *Wilkinson vs. Byers*, 1 Ad. & Ell. 106. (2.) Where creditors accept a compensation less than the amount of their demands. *Aiken vs. Price*, Dud. 50; *Reay vs. White*, 3 Tyrw. 596; *Goode vs. Cheeseman*, 2 B. & Ad. 328.

Individual judges have often expressed dissatisfaction with the rule; but no case, it is apprehended, can be found, which is in direct and avowed conflict with it; and it is now too well settled, by an unbroken current of decisions, running through three centuries, to be shaken. The rule, itself, may have its foundation in insufficient reason, but it is fortified by the injunction, *stare decisis*, and *omnis innovatio plus novitate perturbat quam utilitate prodest*, is a maxim the wisdom of which no one will question. Broom, Leg. Max. 61.

R.

Columbia, November and December, 1857.

The intention of the parties was, that Johnston should be discharged from all future liability on his joint promise, and the enquiry is, whether an acquittance, not under seal, acknowledging the payment of one half of defendant's actual liability, is a good bar.

A parol release of the whole sum on the day, in consideration of the payment of a part, is not satisfaction of the whole, because, as is said in *Pinnel's* case, (5 Rep. 117,) by no possibility can a lesser sum be a satisfaction to the plaintiff for a greater sum, and as such a parol agreement is without consideration it is void. Distinctions are taken in cases, where this general principle is modified by circumstances showing a consideration;—as where the release is under seal, it is a satisfaction by deed and is a good bar, because the seal imports a consideration,—or where there is something collateral, showing that the party relinquishing may derive a benefit which might be an equivalent and, consequently, a sufficient consideration. The receipt of a horse, hawk or gold ring has been held to be good satisfaction, as these have no settled value and may be estimated by the plaintiff, even beyond the amount of his debt. Exceptions to the principle, not depending upon full satisfaction, are found in cases where payment is made before the day, or at a different place from that mentioned in the promissory note:—because in the one case, payment of a part, before due, may be more beneficial and as ample satisfaction as the whole would be when due,—in the other case, payment at a different place involves expense, which has been considered a sufficient consideration where the payment has been partial.

The paper offered by the defendants is dated after the day appointed for payment, and is but the payment of a moiety of the balance due;—and in the absence of a seal, which would supersede the proof of consideration, cannot operate as a release: nor does it come within any of the exceptions to the general rule, which has been recognised by our Courts.

Hope vs. Johnston and Carin.

(*Corbett vs. Lucas & Dotterer*, 4 McC. 323; *Eve vs. Mosely*, 2 Strob. 208.)

Accord and satisfaction is payment of the whole debt, (*Fitch vs. Sutton*, 5 East. 280,) and the acquittance relied upon shows that the defendant Johnston paid only one half, which is only satisfaction *pro tanto*.

Motion granted.

O'NEALL, WARDLAW, and WITHERS, JJ., concurred.

MUNRO, J., dissenting. The origin of the doctrine announced in the opinion of the majority, may be traced to *Pinnel's* case, in the third volume of Coke's Reports, where it is thus stated—"It was resolved by the whole Court, that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse, a hawk, a robe, &c., in satisfaction is good. For it shall be intended, that a horse, a hawk, a robe, &c., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise he would not have accepted it in satisfaction. But when the whole sum is due, by no intendment, the acceptance of a parcel, can be in satisfaction to the plaintiff. But in the case at bar it was resolved, that the payment and acceptance of parcel before the day, in satisfaction of the whole was good satisfaction, in regard of circumstance of time, for, peradventure, parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material."

The common law doctrine, then, as to when the partial payment of a debt due by simple contract, will operate as a full discharge thereof, and when it will not so operate; as derived from Coke, and other sources, I take to be this.—A,

Columbia, November and December, 1857.

being indebted to B, by simple contract, say in the sum of one thousand dollars; on the day before the debt falls due, A pays to his creditor one dollar, and takes from him a receipt in full for the debt—this amounts to an absolute discharge of it. But if on the day after the debt has become due, A pays to his creditor, either a moiety of the debt, or any sum less than the whole amount, if it be but a dollar, and takes from him a receipt in full; this amounts to nothing more than a payment *pro tanto*, and the creditor may forthwith in the face of his receipt, institute suit for the recovery of the balance. But instead of the debtor's paying a dollar of the debt, if the creditor shall execute a receipt, and attach to his signature a small bit of sealing wax, or the letters L. S. encircled by the magical scroll, the common law symbol of a consideration, which no testimony is permitted to controvert, or overthrow,—or if instead of doing either of these things, the debtor shall deliver to his creditor, a horse, a hawk, a hound dog, a robe, or its equivalent, a hunting shirt; nay, anything however valueless, provided it be not money; then will the sensitive conscience of the common law, which so abhors and abominates a *nud. pact.*, be completely quieted and appeased, and the debtor held forever discharged from his obligation.

It might well be doubted, if a doctrine so utterly absurd, and standing as it confessedly does in humiliating contrast to the common sense of mankind, would, at any period in the world's history, have been permitted to occupy a place in the jurisprudence of any nation, not absolutely barbarous. But that it should have been permitted for centuries, to occupy a place, in the jurisprudence of one of the most enlightened nations of the earth, and in a system too, which is termed, *par excellence*, the perfection of human reason, almost surpasses belief.

It is gratifying, however, to perceive, that in England, notwithstanding the habitual deference that is paid to the opinion of the great legal oracle, by whom the doctrine in

Hope vs. Johnston and Cavls.

question has been transmitted to them, the ablest of their law tribunals, the Court of Exchequer, has expressly denied its application to bills of exchange, and promissory notes.

Mr. Addison, in his work on Contracts, in treating of this doctrine, at page 1071, remarks, "whenever a contract, not being a bill of exchange, or promissory note, has been broken," &c.,—here he goes on to state, that such contract can only be discharged by a release under seal, or by something given, or done on the one side, and accepted on the other; but he goes on to say—"Bills of exchange, however, which are regulated by the custom of merchants, form an exception to the general rule of law, that a cause of action once accrued can only be discharged by deed, or by accord and satisfaction; for the liability of an acceptor, though complete, may be discharged by an express renunciation on the part of the holder of his claim on the bill, although such renunciation be made by word of mouth, unaccompanied with satisfaction, or any solemn instrument."

In *Foster vs. Dawber*, (6 Exch. R. 839,) the facts of the case were these. The defendant having borrowed of his father-in-law one thousand pounds, at £4 per cent. interest, gave his promissory note for the repayment of the amount on demand, and paid the interest regularly for years, until at last the father-in-law said he would make him a present of the one thousand pounds, and directed him to get a ten shilling receipt stamp, and draw up a receipt for the one thousand pounds, and interest, which having been done, the father-in-law signed the receipt and handed it to the defendant. After that the father-in-law died, leaving a will, whereby he bequeathed the note to his executors, directing them to invest it for the benefit of certain persons therein named, &c., and an action having been brought by the executors, to recover the amount of the note from the defendant, it was held, that the defendant had been discharged. Park, Baron, in delivering the opinion of the Court, said, "Mr. Wills disputed the existence of any

Columbia, November and December, 1857.

rule of law, by which an obligation on a bill of exchange, by the law merchant, can be discharged by parol, and he questioned the decisions, and contended that the authorities merely went to show, that such an obligation might be discharged as to remote, but not as between immediate parties.

"The rule of law has been so often laid down and acted upon, although there is no case precisely on the point as between immediate parties, that the obligation on a bill of exchange may be discharged by express waiver, and it is too late now to question the propriety of that rule. We do not see any sound distinction between the liability created between immediate and distant parties.—Whether they are remote, or immediate parties, the liability turns on the law merchant, for no person is liable on a bill of exchange except through the law merchant,"—and again. "Bills of exchange and promissory notes, differ from other contracts at common law in two important particulars; first, they are assignable, whereas choses in action at common law were not; and secondly, the instrument itself gives a right of action, for it is presumed to be given for value, and no value need be alleged as a consideration for it. In both these important particulars, promissory notes, are put on the same footing as bills of exchange, by the Statute of Ann, and therefore we think, the same law applies to both instruments."

It will at once be perceived, that the case in hand is infinitely stronger than the case of *Foster vs. Dawbar*, for in that case, as we have seen, not a farthing of the debt was paid by the maker of the note, all that was done, was merely the execution and delivery of a receipt in full to the holder, so that the debtor's discharge from the entire debt, was rested solely upon the legal efficiency of the creditor's receipt. Whereas in this case, payment of a moiety of the debt was made by one of the copartners, and a receipt, executed by the plaintiff releasing him from all further liability—notwith-

Hope vs. Johnston and Cavis.

standing this, he is held equally liable with his copartner, for the balance of the note.

In *Sibree vs. Tripp*, (15 M. & W. 28.) Parke, B. said, "If payment of part of a debt, may, under certain circumstances, be evidence of a gift of the remainder, and so support a plea of payment, why may not a gift of the whole be equally cogent evidence? can it make any difference that the parties omitted to say, 'we mean that for payment.'"

Nor is a waning reverence for the all-potent wax, and the magical scroll, less apparent in several of the Courts on this side the Atlantic, including our own, as will be seen by reference to some of our more recent decisions; and it is sincerely to be hoped, that the day is not far distant, when the legislative power, to whom the task of reform in matters of this sort appropriately belongs, will completely abolish the senseless distinction which exists, between a sealed, and an unsealed instrument for the payment of money.

In *Matlock vs. Gibson*, (8 Rich. 437,) it was held: that in an action on a sealed instrument, the defendant may show, that it was without consideration; and that in this respect, there was no distinction between a sealed instrument, and a note of hand, or any other simple contract. And in *Little vs. Duncan*, (9 Rich. 55,) it was ruled; that a single bill executed by an infant, was merely voidable, and may be ratified by him after attaining full age—formerly such an instrument would have been held absolutely void, and incapable of confirmation. Again, it is a doctrine of the common law, that an agent, or attorney cannot execute a deed, or any sealed instrument, in the name of his principal, unless the authority is conferred upon him by an instrument of equal dignity and solemnity, as it is termed. And so too with regard to the members of a copartnership, one of the partners being incapable of binding the firm by a sealed instrument, without an authority under seal. But Story in his work on Partnerships, at Sec. 121, in speaking of this rule, remarks, "The American Courts have

Columbia, November and December, 1857.

strongly inclined to repudiate the doctrine in all cases, where an express, or implied authority can be justly established, not under seal, whether it be verbal, or in writing or circumstantial."

In conclusion, I would merely take leave to add, that the sooner the common law is pruned, and purified of the many antiquated absurdities, that have so long marred, and disfigured its many excellencies, the longer will be the measure of respect and obedience, that will be accorded to it by those whose lot has been cast under its dispensation, and who in the daily intercourse of life are compelled to appeal to it, as the only rule for their civil guidance.

Motion granted.

Wright & McCann vs. Wilson.

JOHN D. WRIGHT & ROBERT MCCANN, vs. JOHN WILSON.

Patent—Jurisdiction—Covenant—Warranty.

B. having a patent for certain improvements in looms, assigned to A. with warranty, that the invention was original, and made upon an entirely new principle in mechanics never before patented. In an action of covenant by A. against B. in which the breaches were assigned in the terms of the warranty, *held*, that the Court had jurisdiction of the matter; that the patent was not conclusive that the invention was original and upon a new principle; and that A. upon proof of the breaches assigned, was entitled to recover.

BEFORE O'NEALL, J. AT ANDERSON, JULY, EXTRA TERM, 1857

The report of his Honor, the presiding Judge, is as follows:

"The defendant had, on the 29th May, 1849, obtained a patent for certain improvements in looms from the United States, and on the 18th of June, 1849, he sold the same for the state of Georgia, to the plaintiffs for four thousand five hundred dollars, which sum has since been paid by the plaintiff, John D. Wright. The defendant's deed of transfer contains the following warranty: 'I hereby warrant and insure unto the said J. D. Wright and Robert McCann, that the aforesaid invention hereby assigned and set over, is original, and that no other loom has been patented in the United States upon the same principle, especially the side wheels which propel the baton, producing two strokes of the baton in one revolution of the wheel, which I warrant to be an invention of my own, and made upon an entirely new principle in mechanics never before patented in the United States by which the loom is increased in speed with less power than any other Power Loom.'

Columbia, November and December, 1857.

"The plaintiffs' action is on this covenant. The plaintiffs, in their declaration, assigned for breach, first, that the said invention was not original; second, that the side wheels propelling the baton, so as to produce two strokes for one revolution, is no invention of the defendant, nor was it made upon an entirely new principles in mechanics never before patented in the United States, nor did it increase the speed of the loom with less power than any other power loom.

"The plaintiffs proved by W. P. N. Fitzgerald, who was the examiner of patents when this patent was granted; that he examined the defendant's invention, and thought there was no substantial novelty, though he made no decision, but referred it to the Commissioner, who granted the patent. He said the side wheels or trammel are not new, but whether previously patented or not he did not know. Mr. Van Patton proved that he is a machinist; that he examined the defendant's loom in the Patent Office. He said it was no improvement; that it will not do more work than other Power Looms. The simpler such a loom the better. The eccentric wheel is no improvement; it was invented in Scotland in 1826; it is not adapted to water power. Mr. Simpson another machinist, saw the loom at Bivingsville, where the model was built; no such loom was put up at Bivingsville; it had no advantage over the Power Loom. The side wheels he said, were an old invention. The defendant's loom, he said, was no improvement. Mr. Hanes said the defendant's loom was no improvement. Mr. Matt Fitzgerald said he preferred the looms now in use at Bivingsville to the defendants; he was head weaver. He saw Simpson and Wilson, the defendant try the loom; it did not work well; he did not regard it as an improvement. Mr. Edwin Reese was examined by commission, first for the plaintiffs, and by a separate commission afterwards for the defendant. His two examinations seemed to me irreconcilable; both will be stated. For the plaintiffs, he proved that he and Durham

Wright & McCann vs. Wilson.

purchased the patent for Alabama; that the defendant represented that a loom of full size would perform well with steam or water power. The witness said that it would not so perform, and the loom was of no account. Many of the defendant's representations he said were false. Among other things, he (defendant) said there were thirty looms of his invention in the Bivingsville Factory; that several hundred were sold; Gen. Whitner had one in successful operation, Jesse Norris had another. This witness on his cross-examination, said that after he had made alterations in the loom, he had five made by Jenks & Son, and sold them at one hundred dollars each. The loom, he said, would weave. Wm. T. Pearce contracted on 8th June, 1853, for the patent right for Tennessee; the defendant exhibited a model loom, and said it would operate as a hand or Power Loom in a factory. Calvin & Johnson, he said, made one; it would not operate. The defendant's representations, he said, were false. Thos. J. Radcliffe proved that Wilson's patent is not an improvement; will not answer the purpose. He has seen the loom made by Jenks & Co.; useless as a hand loom: the looms are not used; the patent is of no account. Allen C. Jones proved that he had purchased of Reese & Durham a loom made under Wilson's patent; it will not answer the purpose, and is of no value. John H. Lewis proved that he tried Wilson's loom; it was not valuable as a hand loom; it was inferior to any other; could never make cloth. John C. Fairis proved that he bought a loom from Reese & Durham; it would not work. It was proven by Mr. Frank Whitner that his father, Gen. Whitner, never had one of Wilson's looms.

"The plaintiffs here closed their case. The defendant gave in evidence his patent 29th May, 1849.

"Dr. H. R. Godman, for the defendant, proved, that he was at Laurens, sale-day in January, 1849, when Mr. Wilson exhibited his loom. Wright, the plaintiff, was present. He

Columbia, November and December, 1857.

claimed that Wilson had a loom a yard wide in operation. He has seen Wright operating with the loom; it operated well; the loom was much sought after; Mr. Wright, he said, was no machinist. Joel Towers proved that he had seen one of Wilson's looms; that which Borstell carried away; it operated very well. On his cross-examination, he said it was a model for weaving any narrow cloth. Elijah Webb, (the clerk,) proved that he saw the model exhibited by defendant; it was publicly exhibited, and the general belief was it would do well. Col. Martin, (the sheriff,) proved that he had seen three looms in operation, the wooden and two others; the wooden one did very well; so the model; saw it weave five yards. He saw Borstell's after he bought; it was full sized, and operated well. He said that McCann said, 'Wilson had complimented them with the smut machine; there was more money in it than in the loom.' Wright, after he went to Georgia, offered to sell the patent to him. In '55 or '56 he was authorized by his son who lived in Georgia to purchase from Wright, the plaintiff, the patent; he was authorized to give as much as the plaintiffs paid. On proposing to buy, Wright said it was in law, and he could not sell; he thinks he made no offer. He thinks his son saw the defendant; he had tried to sell the loom to him and his sons. The defendant said, after exhibiting his model, he had engaged sixty or seventy looms at Columbia. He understood Whitner was in with him. There was no trick on his part in the offer to buy. He thinks Wilson owed Whitner.—Robert H. Hubbard proved that the loom which Borstell had was a yard loom; it wove at the rate of ten yards to the hour, (five or ten minutes was the time of trial.) The defendant was present; any one could operate with it. Dr. Evans proved the satisfaction of a judgment recovered 25th September, 1854, on a note made by the plaintiffs in part payment of the purchase of the patent. It was satisfied 1st January, 1857, by the note of Wright and the Maxwells. This witness said he first saw the loom in

Wright & McCann vs. Wilson.

Columbia; it performed very well. He also saw it in Borstell's possession; he thought it performed well. John T. Sloan proved that he saw Borstell's loom; it did well; it operated for only two or three minutes. Col. Jesse Norris proved that he was on the committee who examined the loom for the Farmer's Society; it wove very fast. He said he never had one of the looms.

"The defendant then gave in evidence several letters of the plaintiff, Wright. In the letter of 22nd August, 1854, the plaintiff, Wright, speaks of the sale of his negro man about to take place under the defendant's execution; he asks to have the sale stopped, and promises to pay the debt. The letter of the 18th January, 1851, prohibits the delivery of the model to McCann, his co-plaintiff. Then followed letters of the 21st January, 3d February; that of 17th September spoke of the smutter; then followed that of 22nd October, which requested the defendant to sell at Macon the patent right for four thousand dollars, or as much as he could get. The letter of 18th December asked for indulgence, and stated the loom to be a failure. On the 26th August, 1851, the plaintiff, Wright, again wrote to the defendant, complaining of levies, &c.

"Edwin Reese examined for defendant, proved that he and Durham purchased the loom for Alabama; they had looms manufactured by Jenks & Son, and another. *The looms performed well; they were valuable, selling at one hundred and twenty-five dollars each. The looms were got up finer than the model. It is an useful invention, as a hand loom.* It requires more gearing to be applied to machinery. The principle of the invention is old; *the application is new.* The loom would not run by water or steam power. Wilson told this witness he had seven hundred looms in operation in South Carolina. I. W. Taylor proved that he saw the loom in operation twice; he saw that which Borstell had; it was large size; it operated faster than the old power loom; it was valuable. A. O. Norris, Esq., proved that he saw the wooden

Columbia, November and December, 1857.

loom; it wove rapidly. He gave Wilson an order for a loom, but never got it; a good many more ordered in the district. The loom made good cloth. Simpson, the witness, Mr. Norris proved, came to Anderson to set up a foundry, in connection with the loom. He has heard him say this loom could be connected with steam or water power.

"I was of opinion, and so instructed the jury, that the patent did not conclude the inquiry whether the supposed invention was new or not. The burden of showing that it was not new was on the plaintiffs, and if they had not satisfactorily proved *that*, they could not recover.

"I thought that the breaches of the covenant were sufficiently assigned, and if proved the plaintiffs might recover. But I thought they could not recover the whole sum paid; the patent had not been re-assigned, or offered to be; the plaintiffs could only recover such damages as the jury thought they might have sustained.

The facts were submitted to the jury; and certainly the defendant has no right to complain in that particular. The jury found for the plaintiffs two thousand four hundred dollars; and although I would not have so found, yet the matter was one for their decision properly, and I would not interfere with the verdict."

The defendant appealed, and now moved this Court in arrest of judgment, and failing in that, then for a new trial, on the grounds:

In arrest of judgment.

1. Because it is respectfully submitted that the question, whether an invention or new discovery is really such, and patentable, for which a patent has already issued from the Government of the United States, is not cognizable in the Courts of this State; and the fact that letters patent have issued, is conclusive that the subject of the patent is a discovery or invention, and patentable.

Wright & McCann vs. Wilson.

2. Because the only alleged breaches of covenant averred in the declaration were, that the said invention assigned and set over by the defendant to the plaintiffs, was not original, but on the contrary thereof, that other looms have been patented in the United States upon the same principle; that the side wheels which propel the baton, producing two strokes of the baton in one revolution of the wheel, is no invention of the defendant, was invented by others, nor was it made upon an entirely new principle in mechanics never before patented in the United States, nor did it increase the speed of the loom with less power than any other power loom; but on the contrary thereof, side wheels of a similar kind, and upon the same principle in mechanics, were patented in the United States, and which increased the speed of looms with as little or less power, than the side wheels of the loom so patented and assigned, as aforesaid—which, even if they had been proved, did not make a case within the jurisdiction of the Courts of this state.

3. Because the only averment that possibly might have given the Court jurisdiction, to wit: that the discovery or invention was of no use and valueless, was not made in the declaration.

4. Because the case stated in the declaration is wholly insufficient in law, even if it had been proved, to support the judgment.

For a new trial.

1. Because for the reasons stated in the above grounds, the verdict of the jury was erroneous.

2. Because the evidence offered was not relevant to the issue made, and did not establish any one of the allegations of the declaration.

Columbia, November and December, 1856.

3. Because all that the defendant sold was a mere chose in action, and all that he warranted was, that the United States had granted to him that chose by issuing to him letters patent.

4. Because no evidence that could have been offered, upon the breaches assigned in the declaration would have entitled the plaintiffs to recover.

5. Because the patent was sold by the defendant to the plaintiffs at the price of four thousand five hundred dollars, and the verdict of the jury, for two thousand four hundred dollars, negatives the assertion that the patent was of no value, and the proof of its usefulness and value was abundant.

6. Because the plaintiffs, if they ever had any right of action, waived it by their long acquiescence in the contract of purchase, and making arrangements to procure indulgence, and promising to pay the debt, with interest annually.

7. Because the verdict was not only without evidence, but contrary to law, and the charge of his Honor.

Sullivan, for appellant.

Young, McGowan, contra.

The opinion of the Court was delivered by

O'NEALL, J. This action it must be remembered is on a covenant of warranty. The breaches assigned are plainly within the terms and intent of the covenant, and I cannot perceive, when they are found to be true, how we can entertain a motion for a non-suit. The defendant's warranty is shown to be false, and he must respond in damages. The mistake of the defendant is in supposing, that his patent

Wright & McCann vs. Wilson.

concludes all investigation. Beyond all doubt if he was to sue for an infringement, the matters would be in issue, whether it was original, or a new application, or useful. If that be so cannot a party buying it show, that it was neither the one nor the other of these? I do not entertain a doubt, that he can: and this is very plainly shown by the observations of the Court on the defendant's fourth and fifth pleas, in *Mullikin vs. Latchem*, 7 Blackford, 136.

The question, whether the Court of Common Pleas has jurisdiction of such a case, is rather a startling one. The action is covenant, an old and familiar head of the Common Pleas jurisdiction. Because the covenant happens to be of a patent, previously granted by the United States, is no reason why the Court cannot go on and ascertain whether the covenant has been broken. The United States in granting a patent do not conclude all persons by it: it is granted on an *ex parte* application, and if it turns out to be, as the applicant represents, then he will have by his patent the exclusive right, otherwise not. The jurisdiction of the United States Court over this class of cases, depends upon other circumstances than the fact, that the validity of a patent may be drawn in question.

The questions whether the breaches were sustained by the proof, were properly to be decided by the jury: and to the jury they were referred, with certainly a pretty clear indication of my opinion in favor of the defendant. But they thought proper to find otherwise, and I cannot say they were manifestly wrong.

The motion for a new trial is dismissed.

WARDLAW, WITHERS, GLOVER and MUNRO, JJ., concurred.

WHITNER, J., did not hear the argument.

Motion dismissed.

Columbia, November and December, 1857.

HERNDON CHALK, ET AL., vs. SAMUEL McALILY.

Practice—Continuance—Easements—Adverse use—Backing water in channel of stream—Damage—Cases approved.

The 23d and 25th rules of Court give directions to parties in reference to motions for continuance, but impose no restraint upon the discretion of the Court.

Where one backs water by his mill-dam on another's land, the use, if long continued, should, it seems, be considered adverse, in the absence of proof that it was permissive.

Garrett vs. McKie, 1 Rich. 444, as understood by the Court, approved.

Backing water within the channel of a stream, from which no appreciable damage results to the owner, is not of itself a legal injury which will sustain an action.

BEFORE WHITNER, J., AT CHESTER, EXTRA, JULY TERM,
1857.

The report of his Honor, the presiding Judge, is as follows:

"This was an action on the case to recover damages for the erection of a mill-dam on Sandy River, whereby, as was alleged, the water was raised above its natural level, causing plaintiffs' lands to be overflowed and their mill to be prevented or retarded in its operation.

"The parties owned lands on the river, the dividing line being over a mile above defendant's mill-dam, and the sites of the two mill near two miles apart. The stream was sluggish, having but little fall and high banks.

"On the lands owned by defendant, there had been erected a mill and dam, in the years 1830—'31, and in operation ever since, except for a brief period, when rebuilt in 1853.

Chalk vs. McAlilly.

Much of the bottom land of defendant had been advantageously cultivated, being situated between his dam and upper line.

"The first suit brought for the alleged injury was by George Chalk, March 11, 1854, who was then proprietor of the lands and mill now owned by present plaintiffs, his heirs at law. A cause of complaint was the increased elevation of the new dam. That suit abated by the death of the plaintiff, which took place the 18th November, 1855. Some time in the year 1854, defendant reduced the height of the dam ten inches, though it was in proof he had given instructions to his workmen to confine the structure of the dam within former limits. March 8th, 1856, present suit was brought, an intermediate suit by the executors of George Chalk having failed on demurrer. The mill now owned by plaintiffs, had been erected long before the defendant's, above and on the same stream. Between these mills the plaintiffs owned lands on each side of the stream, though at the upper mill-seat the lands were owned, on the one side by plaintiffs, and on the other by a Mr. DeGraffenreid. At this place two mills were erected, a saw and grist mill, supplied out of a common dam, and by an arrangement between the parties, the latter mill, in which plaintiffs were interested, was only to be used when necessary to do the grinding of the proprietor, or when the supply of water would admit the running of both mills.

"It was a tub mill of very simple structure, had been very little used in later years, and is not at all used now. The saw mill, on the contrary, was much used, and was situated directly in the main channel. The water from the grist mill had been discharged formerly by means of a small canal, leading into the channel of the stream. This canal was obstructed at its mouth and much filled up at other points. With these lands, as is found frequently, there was a greater elevation at the banks. They had been cultivated with a varying success, and difference of opinion existed on the part

Columbia, November and December, 1857.

of witnesses, as to the fact of any injurious effect resulting from back-water.

"The verdict was for the defendant, and in my judgment was well authorized by the evidence. The plaintiffs not only failed to establish that they had sustained any actual injury from the erection of defendant's mill-dam, but I thought still more conclusively did it appear that the defendant had a prescriptive right to the enjoyment.

"In reference to the first ground of appeal, I need only say that, for the first time, in this case I was given to understand that the twenty-fifth Rule of Court, only operated upon the party who applied a second time for the continuance of a cause. In the language of this Rule, 'after the first term,' I required 'a party applying for a continuance on account of the absence of a witness,' to 'set forth in addition to the requisitions of the twenty-third Rule what he believed the witness would prove.' The case was expected to occupy at least two days, an extra term was ordered very much in consequence, and the absent witnesses resided in an adjoining District. Further, as to the hardship of being ruled to trial, I desired plaintiffs' counsel to print as part of the brief, the amended affidavit, setting forth the facts expected to be proved by the witnesses.

"I do not know to what witnesses the plaintiffs have reference in the second ground of appeal. I have no note of such a question being made, and hence presume I must have concluded none such was intended. Opinions of some witnesses, after being interrogated as to the facts, were freely given on each side and without objection; occasionally a witness was on the stand who had very little or no information on the subject, though asked for an opinion; in case of objection, on finding such witness had no reason to give on which to base an opinion, his opinion was not heard. I am satisfied it was only to witnesses of this class that the objection was raised.

Chalk vs. McAlly.

"The third ground of appeal may not be correctly apprehended. The jury were distinctly instructed that, to create an easement such as that set up by defendant, there must have been an adverse, continuous, uninterrupted use for twenty years at least, the character of the use to depend on the fact ascertained by the jury. Counsel may perhaps more successfully indicate, before another tribunal, the proof on which so strong reliance is placed that defendant, in this case, could not set up a right by prescription, and that the jury should have been so charged.

"Upon the other grounds of appeal, I may say, generally, that notwithstanding differences among the witnesses, I considered it pretty well established that the water in the channel of the river along plaintiffs' land, was raised by the dam some inches above its natural level. This, it was insisted in argument, though confined within the banks and extended to a single inch, without further injury, gave to the plaintiffs a sufficient cause of action. I did not feel myself at liberty to sustain such a doctrine, especially since the case of *Garrett v. McKie*, (1 Rich. 444.) With that case before me, the jury were fully instructed in conformity with the authorities and illustrations thence derived. The dam being on defendant's land was rightful, unless he had thereby thrown the water back injuriously upon the plaintiffs', either as to their lands or mill. Was the land in consequence overflowed, made wet, rendered incapable of cultivation, or any effect whatever produced and clearly to be traced to this cause, resulting in injury to the plaintiffs, were the inquiries addressed to the jury. These questions they were requested to solve from facts established by proof, or by such conclusions as might be fairly authorized thereby. In reference to the natural flow of water within the channel, I adopted the sensible view, suggested by Judge Story, 'that there may be and must be allowed of that which is common to all, a *reasonable use* ; the true test of the principle and extent of the use, is

Columbia, November and December, 1857.

whether it is to the injury of the other proprietors or not.' That it was not enough to maintain this action that it should simply appear the water was raised above its natural level if confined entirely within the banks or channel of the stream, unless some injury or special damage was also shown. When I had concluded my instructions to the jury, my attention was called to some of the evidence supposed to have been overlooked or misapprehended on points deemed material, and after a reference to my notes, I was further requested to give further instructions in terms suggested by counsel. These I required to be submitted in writing, and they were furnished in the following words: 'That if the jury believe that the dam will cause the lands of plaintiffs to overflow sooner, to remain longer under water, and fill up the ditches and races, that then that would be an injury in law.' I declined to adopt the language suggested or add any thing on that branch of the case to what had been said. I thought and said that a margin sufficiently broad had been furnished for an intelligent jury to meet the case presented. I preferred to present general principles, and leave their application where it properly belonged."

The plaintiffs appealed, and now moved this Court for a new trial, on the grounds:

1. Because his Honor erred, as is respectfully submitted, in requiring the plaintiffs, on the first application for a continuance of their case, to state what the absent witnesses would prove; and then still, after they had so stated what those important witnesses would prove, ordered the case on to the prejudice of the plaintiffs' rights.

2. Because his Honor erred, as is most respectfully submitted, in refusing to permit the witnesses of the plaintiffs, who had viewed the bottom lands and mill of the plaintiffs,

Chalk vs. McAlilly.

on Sandy River, to state that they were, in their opinions, injured by the erection of the defendant's dam on Sandy River below, from the backing of the water on the land and mill of the plaintiffs by said dam.

3. Because the defendant, and those under whom he claims, cannot claim by prescription in this case, as the easement enjoyed in flowing the water back on the lands and mill of the plaintiffs, was permissive, and not adversely claimed by those under whom the defendant claims, and so his Honor should have charged the jury, which was not done.

4. Because his Honor charged the jury that the act of the defendant, and those under whom he claims, in flowing back the water on the plaintiffs' lands and mill, as long as the water so flowed back remained within the banks of the natural channel of Sandy River, was no legal injury, in which it is most respectfully submitted there was error in law.

5. Because the evidence given in the case clearly showed that the mill and bottom lands of the plaintiffs, on Sandy River, were certainly injured, and the verdict should have been for the plaintiffs.

6. Because his Honor, on being requested so to do by plaintiffs' counsel, should have charged the jury that if they should be of opinion that though the water which flowed back on plaintiffs' lands and mill by the defendant, and those under whom he claims, remained within the banks or channel of Sandy River, still if they should be of opinion that it caused injury to the plaintiffs by causing the water sooner to overflow the lands and mill, and cause the water to fall more slowly, and to fill up the channel and ditches more rapidly, it gave right of action—this his Honor declined to do, in which it is submitted there was error.

Columbia, November and December, 1857.

7. Because the verdict is contrary to law and the evidence in the cause, and should be set aside and a new trial granted.

Thomson, for appellant.

Witherspoon, contra.

The opinion of the Court was delivered by

WARDLAW, J. We will not pass the first ground of appeal unnoticed, although appeals from the discretion exercised by a Circuit Judge, in rejecting motions for a continuance, have been so often discouraged here, that it may seem idle to say another word on the subject. The twenty-third Rule of Court imposes no restraint upon the Judge, but gives directions to parties; it does not declare that what is there prescribed shall avail to effect a continuance, but that less need not be expected to serve. The same observations apply to the twenty-fifth Rule. Its words show that it refers to any term after the first, not to a renewed application by a party who before had obtained a continuance. Discretion exercised at a former term must be taken by a Judge, at any succeeding term, to have been properly exercised; and only as it may affect his opinion of the diligence or good faith of a party who applies to him for continuance, is it material for him to know upon whose application a former continuance was granted. When counsel of experience give the prominence of the first place to such a ground of appeal as the first one in this case, it is hard to resist a suspicion, that the same want of confidence which ought to have been felt in the first, did extend to all that followed. We have however carefully read the mass of testimony which has been sent up, have listened to the zealous arguments of the plaintiffs' counsel, and have examined the full notes, printed and written, which he has submitted.

Chalk vs. McAlly.

The second ground of appeal is answered by the Report.

The Report shows too, in reference to the third ground, that an adverse, uninterrupted use for at least twenty years, was required by the instructions, and the objection, made in argument here, is that the use should have been deemed permissive, because there was not sufficient evidence that it was exercised with the assertion of right. It was properly submitted to the jury to judge of the force of the evidence, and this Court cannot perceive that the jury erred in finding that a defendant, who backed water by a substantial dam, for the propulsion of permanent and expensive machinery, showed that he claimed a right to do what was so long continued, and so essential to his interest. Use, in derogation of another's rights, in the absence of evidence to show a permissive character, is ordinarily presumed to be adverse, after it has continued long unquestioned. If, in a case like this, there should appear such permission of the use as would show a parol license under which money was expended in improvements, much deliberation would be had before a withdrawal of the license should be allowed to impair the value of the improvements. But it is said for the plaintiffs, that the use was a silent, insidious invasion, which attracted no attention, and therefore should not acquire the rights which result from an open, notorious possession. It was to some extent an overflowing of soil—visible and continuous; and if it was half so hurtful to the plaintiffs, or their ancestors—as for them it is now said to have been—it could not have escaped notice and complaint. Upon the supposition that the acts done by the defendant are materially prejudicial in any way to the rights which have devolved upon these plaintiffs, the finding of the twenty years' use by the defendant, under the instructions which were given to the jury, would have been conclusive of the case, if no other question had been submitted. But there was another question, which brings us to the consideration of the remaining grounds of appeal. The jury may

Columbia, November and December, 1857.

have found that the use was not such as the instructions required that it should be, to protect the defendant; yet they may, under the further instructions, have found that the plaintiffs sustained no damage from the water backed in the channel of the stream, and so may have rendered a verdict for the defendant because the banks were not overflowed within the plaintiffs' line. Referring under this head to what is said in the report, we see that the case of *Garrett vs. Kie*, (1 Rich. 444,) was taken as a guide in the circuit, and that the effort of the plaintiffs here has been to procure an overruling of that case.

If that case is understood to mean that, in an action for backing water, special damage must be specified in the counts wherever the banks of the stream in question have not been overflowed; or that, without regard to the harm done by backing within the channel, such backing is always defensible, then we dissent from such conclusion. But if it be understood, as was meant to be decided, that backing within the channel, from which no appreciable damage results, is not of itself a legal injury which will sustain an action, then we adhere to it. The proposition, which thus we approve, results, we conceive, from the reasonable use of water, which every one through whose land it flows is authorized to enjoy; considered in connection with the necessities of machinery upon sluggish streams and in a flat country. It is said that water must be allowed to flow as it was wont to do, and to pass undiminished and undefiled to the proprietors below. Yet a dam may be erected which shall spread the stream over a surface far beyond its natural extent, and so diminish by increased evaporation the quantity which would otherwise have passed down, or the limpid current may be polluted by saw dust, occasionally dropped and whisked along in the foam of a mill tail. These, it is replied, are trifles about which the law does not care, occasioning no

Chalk vs. McAlly.

material detriment, and excused in consideration of the necessities and advantage of a mill.

In like manner, shutting down the gates of a mill which is fed by a pond; must necessarily lower the water in the channel below. And raising them must necessarily elevate the water. Such a mill cannot be worked at all, without disturbance of the natural flow, and such disturbance, in many instances, may be observed for several miles below a mill, upon some of the best mill streams of this State. Every such disturbance, either by elevation or depression, is forbidden by the extreme principle which would require us to hold that any interference with the order of Nature within another's territory, constitutes a legal injury, without consideration of damage. A temporary, yet frequently recurring interference may differ in degree from a constant one, but not in principle. A fluctuating condition of a stream might, under various circumstances, be quite as harmful as either a permanent elevation or a permanent depression of the water's surface. An invasion of right which is justified in regard to a proprietor below a mill, cannot without some difference in principle, or in consequence, be the subject of action by a proprietor above. In both cases it is safe to limit the invasion to an extent which does no harm; and where it is in analogy to other reasonable enjoyments of flowing water, so limited, the law may well permit considerations of general expediency to excuse it. If, however, any appreciable damage has been done by the invasion, the limit has been exceeded, and an action lies.

If a shoal has been covered or rendered less valuable, if a ford has been deepened, if machinery has been clogged, if the digging of minerals has been impeded, if sickness has been occasioned, if vegetation has been hurt,—if any actual damage has been done by the backing of water within the channel on another's land, then cause of action has been given. In conformity with these views the jury, in the case

Columbia, November and December, 1857.

before us, were instructed to inquire whether the lands or the mill of the plaintiffs had been damaged—whether the land had been overflowed or made wet, or rendered incapable of cultivation, or whether any effect prejudicial to the plaintiffs had resulted from the acts of the defendants. The verdict has answered all these inquiries in the negative. And a review of the evidence satisfies us that such answer was well justified. There was then no need of the Judge to give, in conformity with the writing submitted by the plaintiffs' counsel, further instructions, leading to speculation concerning what would occur in future, as to which the instances that were specified in the writing, if the apprehension of them deteriorated the value of the plaintiffs' property, had been embraced in the principles already laid down. Invasions of proprietary rights, especially of that kind which, if long indulged, will ripen into easements, should be jealously watched and sternly restrained by the law. But if they are harmless, they can at most give only easements which do not hurt, and, whenever they become prejudicial, they will become subject to another rule.

Actions like this ought not to be encouraged upon complaints of fanciful injury done to sublimated notions of exclusive territorial dominion.

Such actions sometimes proceed from rival interests or envious malignity.

The physical changes which our country undergoes in the progress from forest wildness to cultivated improvements are necessarily great; and when slight alterations of a stream are investigated, it is often hard to ascertain their existence, and harder to detect their causes. A verdict, finding even nominal damages for a plaintiff upon his allegation of a continued wrong done to his freehold, becomes evidence upon which future verdicts may be claimed, that in the end will compel a defendant to remove the imputed cause of wrong, even by sacrificing valuable interests. In this case it is prob-

Chalk vs. McAlly.

able that the banks of the plaintiffs have been covered by back-water for two inches of perpendicular height, and for a distance of one or two hundred yards above their line: the jury say that from this invasion of their extreme rights no damage has come to them; and in dismissing their action, we indulge the hope, that further developments and further exertions on their part will show that the deterioration of their mill and land, which they have ascribed to the acts of the defendant, has proceeded from causes either inevitable or within their own control.

The motion is dismissed.

O'NEALL, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, May, 1856.

Columbia—May Term, 1856.

JOSEPH E. MCCOY vs. THOMAS E. LEMON.*

Mayhem—Damages: Increase of by Court.

The common law rule, that, in cases of Mayhem, the Court may increase the damages, *super visum vulneris*, does not exist in South Carolina.

BEFORE WARDLAW, J., AT SUMTER, SPRING TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of trespass for assault, battery, and mayhem. The pleas were *non cul.* and *son assault demesne*.

"It appeared that unkind feelings existed between the parties, who were near neighbors. That whilst the plaintiff was, with an axe, in the discharge of public duty, working on a road, the defendant, who was not a hand on the road, made appeals to the defendant about a previous fight between the defendant's brother and a hireling of the plaintiff, although plaintiff requested that his name might not be used. That, thereupon the plaintiff made a very offensive charge of moral delinquency against the defendant, to which the defendant replied by the d—d lie. That instantly the plaintiff struck a severe blow with the axe at the defendant's head, which the defendant dodged so that only the axe handle hit him. That a fight ensued, in the course of which the defendant, the larger man, bit and gouged the plaintiff, and the plaintiff

* This case was argued and decided at May Term, 1856, but the opinion was not filed until October, 1857.

McCoy vs. Lemen.

attempted to gouge him. That afterwards the plaintiff uttered horrid imprecations against the defendant, lay suffering for a long time, and in consequence of the defendant's acts lost one eye and the use of one thumb.

"The jury found for the plaintiff thirty dollars—a sum which I thought very small, to be found by those who had ascertained his right to recover something.

"After the verdict was rendered, the plaintiff was presented for my inspection, and I could not but perceive that he was maimed in the manner described in the declaration and shown by the evidence. Whereupon the plaintiff moved for a rule against the defendant, to show cause why the damages should not be increased. Upon return of the rule, I refused to interfere—not because I considered the damages sufficient, nor because I thought the Circuit Court was not the tribunal to which the plaintiff's application should be made, if it could be properly made anywhere; but because I thought that, under the laws and practice of this State, no Court possesses the power to increase or diminish the damages in due form found by a jury, in any other way than by granting a new trial.

"The plaintiff appeals from my refusal to increase his damages; and under notice given, will also make to the Court of Appeals his motion for increase, as if the rule was returnable to that Court."

The plaintiff appealed, and now moved this Court to reverse the decision of his Honor, on circuit, and either to increase the damages here, or to send the case back to the Circuit Court, with instructions to the Judge, at the next term, to increase them, on the grounds:

1. That, by law, the damages may be increased by the Court in actions of assault, battery, and mayhem; and, in this State, the authority so to increase the damages is vested in the Circuit Judge, with right of appeal.

Columbia, May, 1856.

2. That this is a proper case for the exercise of such authority ; and his Honor erred, it is respectfully submitted, in refusing to exercise it.

3. That the verdict having negatived the plea of justification, the plaintiff was entitled *ex debito justiciæ*, to recover damages commensurate with the injury he sustained from the loss of his eye and the injury to his thumb.

Spain, for appellant. The action is trespass *vi et armis*, for *mayhem*, which consisted in the destruction of an eye, and the loss of the use of thumb of the right hand. Verdict, thirty dollars for plaintiff—"a sum," says the circuit Judge, "which I thought very small to be found by those who had ascertained his right to recover something." So thought the plaintiff and his counsel, and hence the motion to the Circuit Judge to increase the damages *super visum vulneris*. The motion was refused, and hence this appeal. The refusal on the part of the Circuit Judge was not based upon the notion that the jury had found damages sufficient in amount, but because "no Court possesses the power to increase or diminish the damages in due form found by a jury, in any other way than by granting a new trial."

To the first branch of the proposition the plaintiff objects—to the second he accedes. "To increase the damages," some Court possesses the power, as a Court, "otherwise than by granting a new trial," but only in this form of action. The right "to diminish" is properly negatived.

This is an action at common law, and the common law incidents attend it, unless these incidents have been repealed by statute. "One remarkable property is peculiar to the action for *mayhem* ; viz., that the Court in which the action is brought have a discretionary power to increase the damages, if they think the jury at the trial have not been sufficiently liberal to the plaintiff ; but this must be done *super*

McCoy vs. Lemon.

visum vulneris, and upon proof that it is the same wound concerning which evidence was given to the jury." Note 5, 3 Black. 121.

Benton vs. Bayne's, Barnes Notes, 153, where the damages were increased. *Brown vs. Seymore*, 1 Wils. 5, in which Lee, C. J., said, "there is no doubt but the Court can increase the damages, &c." See cases cited. Many other cases have been found to the same effect from "*black letter*" down to the date of Christian's note to 3 Black. Here is an unbroken current of common law authority in favor of the motion; and what is the objection to the exercise of the power, as is admitted would and ought properly to be invoked and exercised in this instance, if it existed in this State? What has deprived our Courts of their common law "power" in this particular?

Obsolescence cannot be properly urged, and if urged should not prevail. The Court should exercise its "power" in proper cases, however novel or unpopular the case invoking the aid of the Court.

The English Courts and ours have declared "that an Act of Parliament" (of the State) "cannot be repealed by non-user;" (*State vs. Tidwell*, 5 Strob. 7.)

The Act of 1712, (2 St. 409, ("imported into our code" the British Statute, 4 and 5 Phil. and M., Ch. 8, "since it appears in the schedule accompanying that Act, by the designation of the names of those who wore the crown, the year, chapter and title." Per Withers, J., Id. Thus, "a person seducing away from her father's house a maid under sixteen years of age, and deflowering her afterwards, without the consent of her parents or guardians," was held to the penalty imposed by said statute in 1802, *State vs. Findley*, 2 Bay, 418: though that "was the first conviction which ever took place in Carolina, under the statute of Phil. and M. for that offence."

That statute was passed by the British Parliament in 1557, two hundred and forty-five years before it was ever enforced in Carolina, and ninety years after the Act of 1712.

Columbia, May, 1856.

As non-user does not repeal an Act of Parliament in England, or an Act of the Legislature in this State, the plaintiff insists, under the 5 Sec. A. A. 1712, (2 St. 413,) "that all and every part of the *common law of England*" is the statute law of Carolina, "where the same is not altered by the" Acts of the British Parliament enumerated in the schedule to the Act of 1712 "or inconsistent with the particular constitutions, customs and laws of this Province;" certain exceptions not affecting the point under consideration being specified in said section.

If, therefore, the statute of Phil. and Mary became statute law in Carolina, for the reasons (or any other) given by the Judge in the case of *Tidwell*, and was therefore obligatory on our own courts, so did "the common law of England" become "imported in our code," as *statute law*, by said 5 Sec. of the Act of 1712, except so far as it was "inconsistent with the particular constitutions, customs and laws of" the then Province.

The common law, then, could no more become "*obsolete by non-user*," than could the statute of Phil. and M., both standing on the same footing of authority, to wit, the Act of 1712.

As to the point under consideration, no change of the common law was made by any British statute, because since 1712 we find English Judges doing precisely what we now urge upon the Court.

No constitution of the "Province" can be found to speak upon the subject; there has been no "custom," for we find no proof of it: and no *law can* be shown to the contrary. It thus appears that the motion should be granted, and the increase made, as sought by the plaintiff.

But this is enough to show that the Common Law is the law of South Carolina, and must be recognized as such, without reference to any other authorities.

Objection on the Circuit was made that a *Nisi Prius* Court could not increase the damages. This is the English Law.

McCoy vs. Lemon.

But its application is denied. Change of organization is not destructive of right. "The power" must exist under our law; and it must reside in our *Circuit* Judges; else the remedy, or right of the party is lost; because, under the organization of our Courts, motions can only be made on Circuit, and appeals can only be taken, under the Constitution, (Art. 10, Sec. 3, 12 St. 13,) "at the conclusion of the *Circuits*," to the "Judges" who "shall" then "meet and sit at Columbia" or Charleston, "for the purpose of hearing and determining all motions which may be made for new trials, and in arrest of judgments, and such points of law as may be submitted to them." The plaintiff, by his notice failing on the Circuit, had the right to be heard in the Appeal Court. One or the other was bound to grant his motion, and increase the damages. The Circuit Court was the proper tribunal, in this State.

Blanding, contra. There is no Court in this State which has the power to increase the damages. This Court is appellate, and cannot exercise jurisdiction in any other way than by appeal; and the authorities show that a *Nisi Prius* Court has no such power, 3 Com. Dig. Damages increased, and the Circuit Court is a *Nisi Prius* Court, 7 Stat. 295.—He further cited Act 1767, 7 Stat. 245; 7 Stat. 260; Jac. Law, Dic. Amercements; 7 Stat. 325, 335, 340; *State vs. Simons*, 2 Spear, 767; *Dran vs. Horton*, 2 McM., 147; 2 Black. Com., 42; *Leigh vs. Kent*, 3 T. R., 364; Magna Charta, § 14, and contended that the rule had never been adopted in this State, and could not now be enforced because it was repugnant to the Constitution and law of the State, to the trial by jury, and the practice of the Court.

J. S. G. Richardson, in reply. That the law contended for by the appellant exists in England to this day, and is familiar to the profession at Westminster, is scarcely con-

Columbia, May, 1856.

troverted. We find it not only in the decisions of the Courts, but recognized by elementary writers as late as 1847. Law Lex., Mayhem, p. 418. Several objections, however, are raised to its exercise here. It is said, in the first place, that *Nisi Prius* Courts have never exercised the power; that our Circuit Courts are *Nisi Prius* Courts, and this Court has only appellate powers; there is, therefore, no Court in this State with authority to enforce the rule. That this Court is appellate we admit, and has no power to exercise jurisdiction in the matter as an original motion. But we deny that our Circuit Courts have only the limited and intermediate jurisdiction of *Nisi Prius* Courts. On the contrary, we say that each District Court in this State has original, complete and final jurisdiction, and possesses in itself all the powers of all the three great Common Law Courts which sit at Westminster Hall. Prior to the year 1768, the only Common Law Court of general jurisdiction which existed in this State, or rather Province, was a Court consisting of a Chief Justice and two or more Judges, which sat at Charleston. In 1734, 7 Stat. 184, the jurisdiction of this Court was declared by statute, and the Chief Justice and Judges were invested with all the Common Law powers of the Courts of King's Bench, Common Pleas and Exchequer at Westminster. In 1768, 7 Stat. 197, and again in 1769, P. L., 269, *Nisi Prius* Courts were established for certain districts in the Province—the Court at Charleston retaining the general jurisdiction, the writs being returnable there, and the record being there kept. 1 Brev. Dig. Intro. 14. As long as this system prevailed, the motion now made could only have been made at Charleston. But in 1789, 7 Stat. 253, that system was superseded by our present District Court system, and now each District Court possesses all the powers of the Court at Charleston, see Act 1791, 7 Stat. 260, that is, it has original, complete and final jurisdiction, and possesses all the Common Law powers of the three great Common Law Courts which sit at

McCoy vs. Lemon.

Westminster. The objection, therefore, so far as the powers of the Circuit Court are concerned, is not well taken.

But it is said that the rule has never been put in practice in this State, and that it is obsolete, and no longer part of our law. In 1712, 2 Stat. 413, the great body of the Common Law was adopted and made the common law of South Carolina. That common law, thus adopted, is the perfection of reason; and its principles having their foundation in truth, are in their very nature immortal. This vital principle of the common law is strongly illustrated by the cases. In 1818, on an appeal of murder, Thornton, the appellee, threw down his glove before the Chief Justice of England, and demanded trial by battle. (1 Barn. & Ald., 405.) The case was discussed before the Judges, and it involved the question whether the right of trial by battle still existed as part of the common law of England. Upon this point Lord Ellenborough, Chief Justice, said: "The general law of the land is in favor of the wager of battle, and it is our duty to pronounce the law as it is, and not as we may wish it to be. Whatever prejudices therefore may justly exist against this mode of trial, still, as it is the law of the land, the Court must pronounce judgment for it." In 1824, in *Postell vs. Jones*, Harp. 93, the question first came before the Courts of this State whether fees conditional at the common law, existed under the law of this State. It was held that they did, although it was then supposed that in England they had "been entirely annihilated by the statute *de donis*." In 1837, the question arose in this State, for the first time, whether a feoffment, with livery, by tenant for life, would bar contingent remainders. It was contended that the law was obsolete. But, said Harper, Ch., "I am not aware that we can regard any law as obsolete, merely because for a long time no case has arisen under it; nor can I conjecture what length of time would be necessary to have the effect." *Redfern vs. Middleton*, Rice, 467, Dud. Eq. 119. These authorities are enough,

Columbia, May, 1856.

and show conclusively that *non user* is no objection to the common law.

Other objections are hinted at rather than urged. It is said that it is contrary to the spirit of our laws, our institutions, our constitution, that a single Judge should assess damages—that this belongs to the jury, and it is an invasion of their right for the Court to do it. There is nothing in any of these objections. The trial by jury has been had in this case. They have found the defendant guilty, and have assessed such damages as they deemed proper. Is it any invasion of their right for the Court to increase those damages? If this had been an indictment for the battery, the Judge would have determined the amount to be paid by the defendant; and merely because the money to be paid is called damages, and not a fine, does that alter the nature of the thing so as to make the exercise of the power so monstrous? But the thing itself is done at every Court. In the *sum. pro. jurisdiction* the Judge alone may assess the damages, and in fact does it in almost all the cases; and in *Bird vs. the Wilmington and Manchester Railroad Company*, the Court of Appeals in Equity, expressly decided, in December, 1855, that the Court of Equity has the power, without the aid of a jury, to assess damages in a case of trespass upon land.

The opinion of the Court was delivered by.

WHITNER, J. The merits of this case, as presented on Circuit, are in no way involved by the present motion.

The battery of which the plaintiff complained had occasioned the loss of an eye, and the jury returned a verdict for *thirty dollars*. This appeal rests on the refusal of the Judge on Circuit to increase the damages, after verdict, on motion of plaintiff's counsel, *super visum vulneris*.

This Court has been urged by a very learned and inge-

McCoy vs. Lemon.

nious argument, to administer a remedy never, so far as we are informed, adopted by the Courts in this country. Not a single case has been found in any book of American Reports in support of the present motion, notwithstanding the great research displayed by counsel. Neither has there been for a period of more than a century any recognition of the rule by any adjudged case in England to which we have been able to procure access. It is true modern text writers, in brief paragraphs, allude to this peculiarity as appertaining to the action of mayhem; and Mr. Christian, in a note, 3 Black. Com. 121, states the point fully, that "a remarkable property peculiar to the action for a mayhem is deemed to exist, viz.: that the Court in which the action is brought have a discretionary power to increase the damages, if they think the jury at the trial have not been sufficiently liberal to the plaintiff; but this must be done *super visum vulneris*, and upon proof that it is the same wound concerning which evidence was given to the jury."—The same principle is stated in Bul., N. P., 21, and Steph., N. P., 225, each deriving authority from the same sources.

Whatever reason may have existed heretofore to justify this peculiarity, in cases sounding in damages, we would be wholly at fault to deduce a rule at all consistent with modern practice.

In the last case at Lent Assizes, in 1742, and referred to by Christian, *Brown vs. Seymour*, 1 Wils., 5, the application was refused, though the Judge said, there was no doubt of the rule. In the case of *Cook vs. Beal*, 1 Raym., 176, I think in 1696, the Court resolved, "1st, That if a wound be apparent, though not a mayhem, an eye injured, not out, but wound visible;" 2d, "For loss of nose, though not a mayhem," or 3d, "If a *grievous wound*," the Court may increase the damages. In *Smallpiece vs. Bockenham*, referred to in Buller, it seems witnesses and jurymen were examined, who all said that no evidence was given that any blow had been

Columbia, May, 1866.

inflicted upon the eye, or that the party had lost an eye by the battery; and for this reason the Court would not increase the damages "for new evidence ought not to be given, for this is a censure on the first verdict and a correction of it."

The question before the Court is one purely of damages; and by what standard could a Judge remodel the verdict? Under the Mosaic Law there was a rule: "Eye for eye, tooth for tooth, hand for hand, foot for foot," but under our present dispensation no such law of retaliation prevails. The legitimate object of the proceedings in our Courts of justice is at once to make reparation to the injured party, and to deter others from the like. We have no standard value of an eye; and hence, according to the cases, in awarding damages, there must be consideration of the nature, quality, and degree of the wrong done. For centuries the wit of jurists has been taxed to settle the province of judges and juries; and though not yet clearly defined in every conceivable case, much progress has been made. Damages, strictly speaking, are a compensation given by the jury for an injury or wrong sustained by the complaining party before action brought: Co. Lit., 257. The *quantum* of damages being in most cases intimately blended with questions of fact, must have been generally left with the jury—Sedg. Dam., 21; but, says the same author, the limits of their power were not at first as clearly defined as they have become in later days. In this course of development we find, in Roll's Abr. 11, p. 703, it said, "the jury are chancellors, and they can give such damages as the case requires in equity," whilst again it is said, "the old books are full of cases where, on judgment by default, and even on demurrer, the Court themselves *fix* the amount of damages, and the remains of this is seen in the power exercised by the English Courts in cases of mayhem."

Other facts appear in our judicial history, illustrating the point under consideration, as we trace the gradual establishment of our practice as settled at this day.

McCoy vs. Lemon.

In the earlier cases, the Courts refused to interfere in granting new trials on account of *excessive* damages; 2 Mod., 150; Comb., 357; or for smallness of damages, 2 Stra. 941, though in each a different rule obtained, sparingly exercised. 1 T. R., 277; 7 T. R., 529; 2 Barn., 354; 2 Tidd, 916.

The Constitutions adopted by the different States of this Union, as well as the whole current of legislation and adjudication, demonstrate the great jealousy of the American people on the subject of jury trial. So universally regarded as a great palladium in England and America, we may well be cautious of any innovation, though the same sentiment should equally guard the improvement which time and experience have engrafted on our judicial proceedings. Our reverence for the common law must have its just limit, and we may well hesitate to adopt any principle not recognized for the past hundred years. The trial by jury has taken the place of other forms once in favor, and the judgment of a panel of twelve men has been incorporated as an indispensable element in the judicial administration of the country. Our notions may well be pronounced inveterate as to this mode of securing rights and redressing wrongs.

At this day we may lay it down as settled, that in all cases sounding in damages, these damages are to be assessed by the jury, under the authority of the Court, and not by the Court independently of the jury; in all cases of vindictive damages, the amount must depend on the sound discretion of the jury. Hence, according to a series of adjudged cases, where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury, and not the opinion of the Court, is to govern. The principle is familiar, and scarcely needs a reference. 16 Pick. 541; 1 Wash. 142; 2 Bail. 252; Id. 408.

This rule in no way conflicts with the practice of again submitting a case to the judgment of another jury in extreme cases, when the verdict is extravagant or trifling.

Columbia, May, 1856.

The question therefore recurs in such a case as the present, what legal rule exists whereby to measure the damages and dispense with the judgment and sound discretion of a jury? However conclusive the argument of counsel on the subject of the transfer of certain powers exercised and distributed by the Courts of England to the law Judge in South Carolina, and however a Court, organized as ours and charged with the administration of the common law, might have been impressed a century ago by the doctrines and authorities now urged and relied upon; yet looking as we must to the long sleep into which this practice, at best not very clearly defined, has fallen in the mother country, and still more to the fact that it has never been transplanted in our soil, and is now wholly incongruous with our usages and institutions, this Court has not seen its way to the conclusion urged. Other and better rules of practice, efficient and satisfactory, have been adopted, in committing that class of cases sounding in damages to the jury under the supervision of the Court, and relying on the proper corrective against mistake, ignorance, prejudice, and caprice, by granting new trials when the damages are excessive or nominal. I may add that it would be hazardous, inconvenient, and to some extent subversive of our judicial machinery, to attempt this retrograde, and perhaps would justly subject this Court to a charge of judicial usurpation.

The motion to increase the damages is refused.

O'NEALL, WARDLAW, WITHERS, GLOVER, and MUNRO, JJ., concurred.

Motion refused.

Johnson vs. Ballard.

Columbia—May Term, 1857.

JOHN W. JOHNSON vs. THOMAS BALLARD, ADMINISTRATOR.*

Non Compos—Necessaries—Implied Promise—Son-in-law—Limitations, Statute of—Promise by Administrator.

A demand for necessaries may be recovered against one *non compos*, upon the implied promise.

A son-in-law is not bound to maintain his father-in-law.

Where an account not barred by the statute of limitations was presented to an administrator, who "made no objection, and expressed his willingness to pay:"—*Held*, that such promise was sufficient to arrest the currency of the statute, and furnished a new starting-point for its commencement.

BEFORE WHITNER, J., AT LANCASTER, SPRING TERM,
1857.

This was an action of assumpsit on an account for board, clothing, nursing, &c., furnished William Miller, defendant's intestate, from 1842 to 1850. The plaintiff was the son-in-law of the intestate, who was in very destitute circumstances, was infirm in body and mind, and incapable of making a contract. The parties resided in Georgia, where the intestate died early in 1850. The defendant took out letters of administration on his estate, in Lancaster district, in this State, and recovered some property to which he was entitled. The action was commenced in December, 1853. A witness for

* This case was decided at May Term, 1857, but the opinion was not filed until a short time before November Term, 1857.

Columbia, May, 1857.

the plaintiff testified that in June or July, 1851, he presented the account to the defendant, and requested payment. Defendant did not pay, for some reason which had escaped witness's memory. Defendant expressed a willingness to pay,—made no objection to paying the account.

The defendant relied on the plea of the statute of limitations. He also resisted the demand on the ground that the services were gratuitous, and contended that this should be inferred from the relationship of the parties, and the intestate's destitute condition. The charges in the plaintiff's account were for six months in each year, at twelve dollars and fifty cents per month, and the proof was, that the charges were reasonable, and that the intestate resided half the time with another son-in-law.

The jury found for the plaintiff \$250.

The defendant appealed, and now moved this Court for a nonsuit on the ground:—

That no contract or promise was proved, and that the intestate being *non compos*, and the father-in-law of the plaintiff, the law would not imply a promise.

And failing in that motion, then he moved for a new trial on the same and on further grounds:—

1. Because the services rendered were gratuitous.

2. Because the account was barred by the statute of limitations, and there was no acknowledgment or promise proved sufficient to prevent the operation of the statute.

Clinton, for appellant.

Moore, contra.

Johnson vs. Ballard.

The opinion of the Court was delivered by

WHITNER, J. The appellant insists there was no binding contract in this case, and relies on the evidence to establish the fact that the intestate was *non compos mentis*. He was not a lunatic declared by inquisition found—his contracts are presumed to be valid, being voidable only. In this instance it was advantageous and beneficial to him. The service rendered was indispensable to his comfort, if not to his very existence. The law will therefore rather sanction than repudiate such a contract, and imply a promise to pay for such a service unless there be some other objection.

It has been urged that the service was intended as a gratuity, and should not now be converted into a charge. This view is pressed, upon the ground that the destitution of the intestate was so entire as to have rendered hopeless all prospect of payment when the service was performed. This would be a strange application of the rule, if not a perversion of the principle. The same view is thought to be authorized by the existing relationship, but in fact the verdict of the jury is quite a sufficient response.

Failing in this, the higher ground is urged that the plaintiff was *bound* in law to support the intestate, being a father-in-law. But in this State the husband is not liable for the maintenance of the parents of the wife, who are *paupers*. He is neither liable at common law, nor is he embraced in any of the relations designated in the Act imposing such liabilities. 2 Bail. 320.

The Statute of Limitations was relied on, and is again pressed upon our consideration. The bar of the statute did greatly reduce the amount of the verdict manifestly, but the acknowledgment of the debt, when the account was presented for payment, in June or July, 1851, was quite sufficient to arrest the statute, for a new term, in the opinion of the jury, and, we think, very properly. When an agent for plaintiff presented the demand, the defendant "expressed his willing-

Columbia, May, 1857.

ness to pay," and "made no objection to paying the account." This, as the President Judge instructed the jury, was not sufficient to revive any portion of the demand then already barred by the statute, and to this instruction the jury evidently conformed. I do not consider it necessary to follow the argument founded on authorities as to the necessity of a distinct promise to revive a debt where the bar is complete, or as to incapacity of an administrator to *bind anew* the estate he represents by any promise in his representative character. No principle to be deduced from such a state of things has been brought to bear in the case, or violated by the verdict.

The evidence, in the opinion of this Court, well justifies the verdict.

The motion for a new trial is dismissed.

O'NEALL, GLOVER, and MUNRO, JJ., concurred.

WARDLAW, J., absent, holding Circuit Court in Charleston.

WITHERS, J., absent from indisposition.

Motion dismissed.

Sams vs. Shield.

GEORGIANA V. SAMS vs. JOHN A. SHIELD, ET AL.*

Evidence—Office Copy of Deed—Seal, Proof of.

Where a party relies, under the Act of 1843, upon an office copy of a conveyance of land, which copy is without seal, he is not concluded by the Register's book, but may show that the original had a seal, which the clerk omitted to copy.

BEFORE WITHERS, J., AT RICHLAND, SPRING TERM, 1857.

The report of his Honor, the presiding Judge, is as follows :

"The single question in this case, (which was trespass to try title to a parcel of land within the corporate limits of Columbia) was, whether a deed of conveyance from the Sheriff of Richland, made 3d March, 1823, had a seal. The original deed was lost, and the copy found upon the Record-book of the Register presented no seal. The attestation clause contained the words—'In witness whereof, I, the said David Beckett, have hereunto set my hand and seal.' One of the two attesting witnesses made probate, before James S. Guignard, Clerk, that he 'saw David Becket sign, seal and deliver' the deed, and that he, with the other witnesses, witnessed the due execution thereof.

"The registration in the record book was executed by some Clerk, and not by Guignard, Clerk. And sundry conveyances therein registered were found in the same condition, with the same clauses of attestation and same probate as that in question now. One was the first in the book, witnessed by John T. Goodwyn and James G. Holmes, and probate made by the

* This case was decided at May Term, 1857, of the Court of Appeals, but the opinion was not filed in time for it to appear among the cases of that Term.—R.

Columbia, May, 1857.

latter. Another was by A. Blanding, Superintendent of Public Works, and a third was by James S. Guignard, himself, as Commissioner of the Public Land in Columbia. Many other records showed a copy of the seals.

"The question of fact was submitted to the jury, whether the evidence satisfied them that the original deed had a seal, and the Clerk who made the registry omitted to register a copy of it. They found that it had—because they found verdicts for the defendants, whose paramount title rested upon Becket's conveyance."

The plaintiff appealed, and moved for a new trial on the grounds,

1. If it be a question of fact to be submitted to the jury, there was not sufficient evidence to show that the original deed had a seal, the matters relied on being vague, fanciful, and unsatisfactory. But

2. It was not a question of fact to be submitted to the jury; and his Honor ought (it is submitted) to have charged the jury that no evidence, or inference, or presumption, was admissible or sufficient to supply the defect in the record which is substituted for the original, and the certified copy whereof is the only legitimate proof of the existence, contents, and execution of the original.

Bellinger, for appellant.

Gregg, contra.

The opinion of the Court was delivered by

WHITNER, J. There was a single disputed question of fact on the trial of these cases on the circuit.

Sams vs. Shield.

An alleged original deed of conveyance of the lands in question, and on which defendants relied, was lost. An office copy was offered in evidence, under the Act of Assembly, 1843, which presented no seal, and this it was insisted arose from a defect in the copy and not in the original.

Such evidence as was in the power of defendants was offered on the subject, all of which, whether arising from the record or otherwise, it was insisted was intrinsically incompetent. The Circuit Judge held otherwise; and the question of fact was submitted to the jury, who found in favor of the deed.

The grounds of appeal challenge this verdict, not only as found on insufficient evidence, but that, as matter of law, "no evidence, or inference, or presumption, was admissible or sufficient to supply the defect in the record, which is substituted for the original, the certified copy whereof is the only legitimate proof of the existence, contents, and execution of the original."

The leading question, it will be seen, presented to this Court is, whether the office copy, regularly certified, furnishes *conclusive* evidence of the fact not to be *gainsaid*.

Adjudged cases answering as direct authority have not been found, and we are to rely on a just application of general principles. The apprehension of fraud unquestionably lies at the very foundation of our rules in reference to muniment of title, with all the attendant solemnities of signing, sealing, and delivery. A prudent restraint should be imposed on any attempt to open the door on this and kindred questions, whilst an over-caution, whereby fair and legitimate inquiry is excluded, would be manifestly pernicious, and lead perhaps to the very evil intended to be guarded against.

The restraints enforced in practice, when a party found occasion to rely on a lost deed, caused much embarrassment and occasionally worked great injustice. The design of the

Columbia, May, 1857.

Act of Assembly, 1843, (11 Stat. 255) was to relax the stringency of the prevailing rules of evidence, and facilities were provided by the Act for the introduction of secondary evidence. That it is evidence *secondary* in degree, however, is certainly true. The original contains the higher evidence, and must still be produced if in the power or possession of the party. The inspection of the original would be more satisfactory, as to questions of fact arising out of it, than could be had either from subscribing witnesses, however tenacious their memory and unimpeachable their character, or from an office copy however unsullied and exact the public functionary. This is stated as a general rule. In the case, however, of this higher evidence by the adduction of the original, if there be an alleged erasure either by accident or fraud, surely the fact may be inquired into and submitted to the jury. The paper speaks, and so strongly, that for the ends of truth, if in existence and accessible, its language must be heard, but it would be a bold position to maintain that in all matters appertaining to what *appears* on its face, all inquiry is excluded. If a seal be added without authority, and after the execution and delivery, it may be made known surely by parol. If it has been subtracted in like manner, it may be inquired into. The very object of attestation is to be assured of *the fact*, and the examination of the witness in every day's practice is directed to the very point. If, as to the original, the fact may be inquired into, and according to the proof the character of the paper be assailed and overthrown or sustained, the next step in our present inquiry is, as to the higher ground claimed by the adduction of evidence conceded to be secondary in degree. When an office copy is presented, fair on its face, bearing evidence of an observance of all the forms required by law to give character to the original, can it be that the original paper itself is thereby secured from assault? *Prima facie* it is what it purports to be, the *act* and *deed* of the party,

Sams vs. Shield.

nevertheless it may not be, and the fact may be inquired into. What amount of evidence may be sufficient to satisfy the mind is not the point yet examined. Again, if an office copy be offered, with an allegation of fraudulent omission or negligent mistake on the part of the recording officer in making a proper registry of the original paper, is such inquiry to be excluded, and the original itself thereby condemned, invalidated, and destroyed? The examined copy is the higher evidence, next in order to the original, of what the original itself purports to be; and the certificate of the proper officer is evidence, which fully satisfies the law of that which it purports, but to hold it *conclusive* absolutely, and thereby exclude all further inquiry, involves the idea of infallibility that does not attach. There is much in the observance of rules founded in experience and practical wisdom, but the title to lands should not be divested by the inroads of time or accident, the invasion of a moth in the removal of a seal, much less by the clerical omission or fraudulent designs of a public Register.

If it be manifest that the very gist of the inquiry was whether in fact the deed in question had been signed, sealed, and delivered, and that such an inquiry was legitimate, whether the original was before the Court or represented by an alleged copy, then it is apparent, from the very nature of the case, that the jury in the present case were properly charged with the fact. If upon certain facts the Court, by the application of rules of law, can pronounce on their legal effect, such inference is matter of law. But this case can in no point of view be regarded as falling within this rule; and hence, as a question of fact, the first ground of appeal sets forth as matter of complaint that the evidence was not sufficient to show that the original deed had a seal.

The evidence submitted to the jury is presented in the report of the Judge and need not be recited. In our judg-

Columbia, May, 1857.

ment the evidence warranted the conclusion reached by the jury.

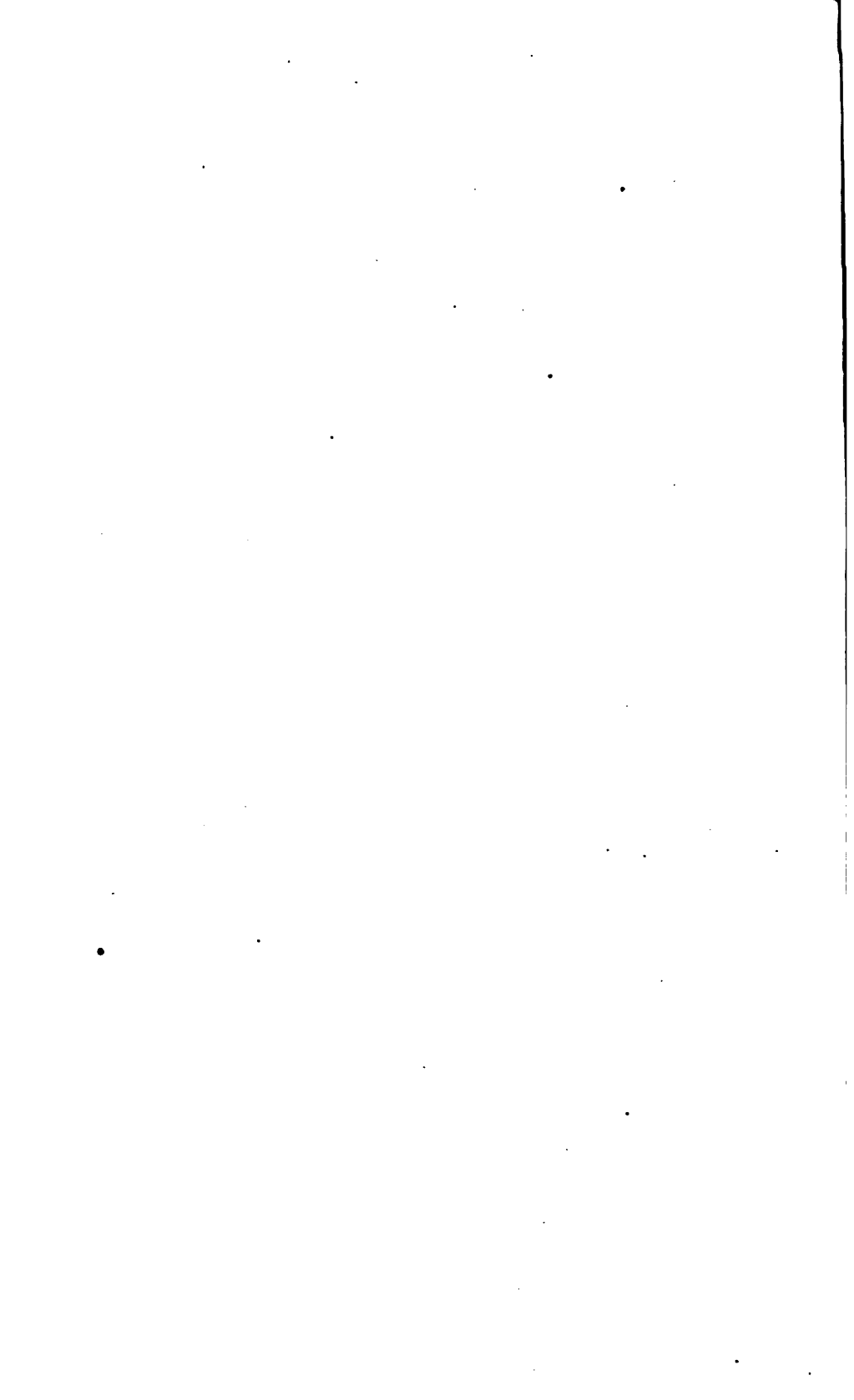
The motion for a new trial is dismissed.

O'NEALL, GLOVER, and MUNRO, JJ., concurred.

WARDLAW, J., holding Court in Charleston.

WITHERS, J., sick.

Motion dismissed.



CASES AT LAW,
ARGUED AND DETERMINED IN THE
COURT OF APPEALS OF SOUTH CAROLINA,
Charleston—January Term, 1858.

JUDGES PRESENT.*

HON. DAVID L. WARDLAW, HON. JOSEPH N. WHITNER,
" THOMAS J. WITHERS, " THOMAS W. GLOVER,
HON. ROBERT MUNRO.

L. W. TRUMBO vs. ALFRED P. REIGNE.

Ordinary—Guardian—Jurisdiction.

The Ordinary of the district in which a will has been proved, and in which the executor makes his returns, may appoint a guardian for a minor entitled to a legacy, under the will, of five hundred dollars, and may cite such guardian to account before him.

BEFORE WARDLAW, J., AT CHARLESTON, MAY TERM,
1857.

The report of his Honor, the presiding Judge, is as follows:
"Louisa Reigne bequeathed by will a legacy of five hun-

* HON. JOHN B. O'NEALL absent, holding Circuit Court for Charleston.

Trumbo vs. Reigne.

dred dollars, to her niece Stephanie. The Ordinary appointed Alfred Reigne guardian of Stephanie, then a minor. Stephanie intermarried with L. W. Trumbo, and died. Trumbo became administrator of her estate, and petitioned the Ordinary for a citation against her guardian. A citation was issued and the guardian, Alfred, objected, that the Ordinary had no power to appoint or cite a guardian, except in case where the minor is entitled to a distributive share of an intestate's estate.

"The Ordinary held, that he could appoint a guardian of personalty to a minor in any case, issued the citation, and decreed payment to be made by A. Reigne to Trumbo.

"Alfred Reigne appealed, and filed a suggestion setting forth these matters.

"I held that the Ordinary's power to appoint and cite a guardian was not confined to cases of intestacy, but extended to a case where the minor's estate, less than one thousand dollars, was in the hands of an executor, to whom the Ordinary had granted probate, and who made returns to the Ordinary.

"The appeal was dismissed."

The appellant appealed to this Court on the ground

That the Ordinary has no jurisdiction to appoint a guardian to a minor, or to call a guardian to account before him, except in the case of a guardian appointed for a minor entitled to a distributive share of an intestate's estate.

Simons, for appellant, cited Act 1745, § 1, 2, 6, P. L. 201, 3 Stat. 666; Act 1789, § 28, P. L. 495, 5 Stat. 112; Act 1839, § 27, 31, 11 Stat. 45, 47; Act 1846, 11 Stat. 358; Act 1808, 5 Stat. 570; Act 1824, § 12, 7 Stat. 328; *Howard vs. Faber*, 2 McC. Ch. 446; *Baker vs. Lafitte*, 4 Rich. Eq. 395

Charleston, January, 1858.

Bac. Abr. Tit. Guardian; 8 Atk. 631; 3 Bur. 1436; 4 Stat. 471; P. L. 387; 1 Des. 56.

Mowry, contra, cited Fee bill of 1791, 5 Stat. 159.

PER CURIAM. This Court feels bound by the authority of the case of *Howard vs. Faber*, 1827, (2 McC. Ch. 446,) which seems to have been ably argued and carefully considered, and had the concurrence of the whole Court of three, then the appellate tribunal for all cases, both of law and equity. If the evils which would then have resulted, from the denial of the power which Ordinaries had long exercised, of appointing guardians of the persons and personal estates of minors, would have been greater than any foresight could have anticipated, vastly aggravated would be the evils of now overruling that decision. Beginning then with a firm reliance upon what has been settled, we find nothing in subsequent legislation which deprives the Ordinary of the power he has exercised in the case before us. The 31st section of the Ordinary's Act of 1839, (11 Stat. 47,) was clearly restrictive. If it related to intestate estates only (as this appellant supposes) then it leaves untouched the power as to testate estates, which the Ordinary before possessed. The Act of 1846, (11 Stat. 358,) only increased the sum which by the Act of 1839 was made the limit of jurisdiction, and whether its words do, (as the appellant supposes) or do not, more clearly than those of the Act of 1839, confine its provisions to cases of intestacy, they in no way deny the power as to cases of testacy within the limit. The debatable questions are, whether the Ordinary's power to appoint a guardian for the personal estate of a minor, in cases where that estate arises under a testament is confined to cases where the executor under the testament is accountable to the Ordinary, and has been decreed by him to owe a

Trumbo vs. Reigne.

certain sum to the minor; and whether the limit of three thousand dollars, fixed by the Act of 1846, applies to such cases under a testament. The decision of these questions is not necessary in the case before us. Under any view of them, the Ordinary here had the power which the appeal challenges: and therefore, without going beyond what the occasion requires, the Court dismisses the appeal, and confirms the order of the Ordinary.

WARDLAW, WITHERS, WHITNER, GLOVER, and MUNRO,
JJ., concurring.

Motion dismissed.

Charleston, January, 1858.

MORGAN C. CONNOR vs. THOMAS HILLIER.

Trover for Certificate of Bank Stock—Damages.

In trover, for a certificate of shares in Bank Stock, the plaintiff is entitled to recover the full value of the shares.

BEFORE MUNRO, J., AT CHARLESTON, JUNE TERM, 1857.

The report of his Honor, the Presiding Judge, is as follows:—

“This was an action of trover, brought by the plaintiff to recover the value of a certificate of two old shares in the Bank of Charleston.

“The case was upon the inquiry docket, and Mr. Thomas J. Shingler, the only witness examined, proved that, as the agent of the plaintiff, he called upon the defendant, and demanded the delivery to him of the certificate of stock in the name of the plaintiff, and that it was refused. He also proved, that at the date of the demand, the shares in the said Bank were worth one hundred and twelve dollars each, and that the plaintiff was unable to sell or to transfer the shares, in consequence of the refusal of the defendant to deliver the certificate. On the cross-examination of this witness by Mr. Campbell, he stated that the defendant urged, as a reason for the non-delivery to him of the certificate, that he had advanced money on the same to one DeGaffarely, but there was no evidence showing how DeGaffarely came into possession of it, or what was his authority to loan money upon it or that the plaintiff to whom the certificate belonged knew any thing of the loan.

Connor vs. Hillier.

"I charged the jury, that in consequence of the default of the defendant in not pleading to the action, the title and conversion were admitted, and that the only question left for them was what amount of damages the plaintiff ought to recover; and that upon this point the only evidence before them was that of Mr. Shingler, who valued the shares at one hundred and twelve dollars each.

"The jury found a verdict for the plaintiff of twenty-five dollars."

The plaintiff appealed, and now moved this Court for a new trial, on the grounds:—

1. Because it was distinctly proved by Mr. Shingler, the only witness examined in the case, that the shares in the Bank of Charleston, for which the action was brought, were worth one hundred and twelve dollars each, and that in consequence of the detention by the defendant of the certificate therefor issued, (in the name of the plaintiff,) he, the said plaintiff, was deprived of his right of sale and transfer of the said two shares, and in consequence of his absolute property therein.

2. Because the effect of the verdict will be to transfer the property in the said two shares in the Bank of Charleston to the defendant for the sum of twenty-five dollars, when they are worth, according to the only proof offered, two hundred and twenty-four dollars.

3. Because the verdict of the jury was capricious, wholly against the evidence, and the express charge of his Honor the Presiding Judge.

Buist, for appellant.

Campbell, contra.

Charleston, January, 1858.

The opinion of the Court was delivered by

MUNRO, J. Whether the finding of the jury was in reference to the mere value of the paper upon which the certificate was written, or to the estimated value of the shares represented by it, this verdict is so palpably erroneous, that it cannot be permitted to stand. So that the question presented is, by what standard should they have been governed in estimating damages for the conversion of such an instrument?

It is a well established doctrine, that trover lies for the recovery of a chose in action, such as a bill, note, or bond, and that the rule for estimating the damages is, the amount which the instrument calls for upon its face. (Sedgw. on Dam., 512.) In other words, whenever the instrument is an available security for the amount claimed, the party is entitled to recover the full amount. In reference to the conversion of muniments of title, the rule is thus stated by Mayne, in his Treatise on Damages, p. 210. "In trover for title deeds, the jury may give the full value of the estate to which they belong by way of damages, which, however, are generally reduced to forty shillings, on the deed being given up." In *Parry vs. Frame*, 2 Bos. & Pul., 451, which was an action of trover for a lease, the plaintiff recovered the full value of the lease. In *Clowes vs. Hawley*, 12 Johns. R. 484, the action was by the assignee of a bond to make titles against the defendant by whom it had been converted, and it was held that the plaintiff was entitled to recover as damages the value of the land.

Upon principle and authority, then, we are clearly of opinion that the plaintiff was entitled to recover the full value of the bank shares, represented by the said certificate, so that a new trial must be granted; and it is so ordered.

WARDLAW, WITHERS, WHITNER, and GLOVER, JJ., concurred.

New trial ordered.

Mitchum vs. Droze.

ELIZA MITCHUM vs. JOHN F. DROZE.

Abatement—Pleading.

Defendant pleaded in abatement the marriage of plaintiff, a female, pending the suit. Plaintiff replied; appointment of an attorney under the Act; and the plea was overruled. At the next term, defendant pleaded the coverture of plaintiff, alleging her marriage to another husband before suit brought:—*Held*, that the second plea was bad after the first was overruled.

After one plea in abatement, defendant cannot plead another in the same degree.

BEFORE GLOVER, J., AT CHARLESTON, FALL TERM, 1857.

The report of his Honor, the presiding Judge, is as follows:

“The action was within the summary-process jurisdiction, and the defendant pleaded the intermarriage of the plaintiff with one Absalom Davis, since the commencement of the suit, in abatement. The 4th May, 1857, the plaintiff appointed Messrs. Petigrew & King, her attorneys to prosecute her suit, reciting in this letter of attorney, that she had married Absalom Davis, since the commencement of her suit. At this term defendant pleaded in abatement the coverture of the plaintiff, alleging her intermarriage with one William Mitchum, before the commencement of the suit. To this it was objected that the plaintiff's coverture had been decided at the last term, and that the plea should be stricken out. I overruled the motion.”

The plaintiff appealed on the ground,

That the question of the marriage of the plaintiff since the institution of the action, having been expressly decided

Charleston, January, 1858.

at the previous stage of the case, the same question could not be again mooted in the same litigation.

J. J. Petigrew, for appellant. The matter pleaded was a second dilatory plea in the same degree. *Bac. Abr. Abatement*, 29; *Com. Dig. Abatement*, J. 3, 1 *Tidd*, 589; 2 *Saund.* 41; 1 *Chit. Pl.* 444, 446, 447. The point really put in issue by this plea had been already decided. 1 *Salk.* 276; 4 *Inst.* 111; *Broom, Leg. Max.* 241; 1 *Inst.* 352, b.

Buist, contra.

The opinion of the Court was delivered by

WHITNER, J. The disability of the plaintiff to maintain this suit because of her intermarriage, pending the suit, was properly subject-matter for plea in abatement. To this plea, the plaintiff replied the previous appointment of an attorney under her hand and seal, to prosecute her suit under the provisions of the Act of 1712.

The case at this stage presented an exact analogy to the case of *Guphill vs. Isbell*, 2 *Bail.* 349, wherein the points are fully considered and the practice settled. Upon the authority of that case, this plea was properly overruled at a preceding term.

By the plea and replication, the allegation and admission of an intermarriage *pendente lite* became a part of the record upon which the judgment of the Court has been had.

At a subsequent term, the defendant filed a second plea in abatement, touching the disability of the plaintiff to maintain her suit, alleging in this plea her intermarriage with a different person before the commencement of the suit, and the single inquiry now presented is, whether this is admissible.

The previous statement suggests the objection, that the judgment of the Court has been asked and obtained substantially between the same parties and upon the same matter in

Mitchum vs. Drose.

this same case. It is not pretended that the plaintiff was at one and the same time the wife of two husbands. The second plea would be frivolous unless, in conformity with prescribed form, it alleges the continued coverture in virtue of the former marriage, and such an allegation is inconsistent and directly at variance with that set forth in the former plea.

The nature and design of a plea in abatement is to have a better writ, the effect being only to suspend the right of action and not to destroy it; hence the general rule, that if the defendant plead in abatement, he ought to give a better writ to the plaintiff, 1 Com. Dig. Abatement, I. 1; and though there be exceptions, pleas of the description now under consideration are not included. The course of pleading now attempted by the defendant would be delusory. If allowed, it may be not only vexatious, but utterly subversive of justice. The entire alphabet may be exhausted if such pleas be permitted to succeed each other. According to the authorities derived from all approved pleaders, there is an order to be observed in such pleas, according to the several classes within which they fall.

A man shall not plead two pleas in abatement, being each in the same degree, though it is said, one after the other he may, if in different degree: as if he pleaded to the person of the plaintiff, and that be overruled, he may plead to the writ; or it would seem in the same degree: when the subject of the second has arisen since the first, 1 Com. Dig. I. 3, I. 4, p. 137; or even after issue joined, if the matter subsequently arises *puis darrein continuance*. 1. Chit. Plead. (437) 320.

To this Court, it appears that the motion now renewed should have been granted on circuit, and it is accordingly ordered that the plea in abatement last filed by the defendant be stricken out.

WARDLAW, WITHERS, GLOVER, and MUNRO, JJ., concurred.

Motion granted.

Charleston, January, 1858.

A. GUYNEMER vs. DAVID LOPEZ.

Promissory Note—Indorser—Release.

The indorser of a note, while it was yet in the hands of the indorsee, released the drawer "from all claims, causes of action in law or equity," &c., and shortly afterwards paid the indorsee and took the note back: *Held*, that the release covered the indorser's contingent right to the note and extinguished it.

BEFORE WARDLAW, J., AT CHARLESTON, APRIL TERM,
1857.

A note for four hundred and seventy-five dollars, dated 5th February, 1855, in favor of and indorsed by L. T. Potter, was admitted. It was also admitted that the defendant was indebted to said Potter for goods sold, one hundred dollars—upon a note due 2d April, 1855, four hundred and twenty-five dollars.

The note was due (sixty days after date) on the 9th April, 1855, and had been taken up by L. T. Potter, (on 11th of April,) after it became due, the same having been discounted in the Planters' and Mechanics' Bank. It was also admitted that the note had been transferred to the present plaintiff after the 11th April, and for valuable consideration. The defendant introduced a general deed of assignment for the benefit of creditors from Lopez to trustees, dated 6th March, 1855, which, after conveying all his property in trust in the first place, to pay all expenses and charges of the trustees, and "from and after the payment of the same, then to pay and apply the whole of the moneys remaining, ratably and in proportion to their respective debts, to and among those creditors only of the said David Lopez, to whom he is

Guyamer vs. Lopez.

indebted, as maker of any promissory note, or as principal obligor upon any bond, or as the principal debtor upon any open account, and who shall, on or before two o'clock, P. M. Tuesday, 10th day of April next, signify their acceptance of this assignment, and execute a release to the said David Lopez of their respective demands."

A general release was also introduced, of various corporations and parties, creditors of David Lopez, in which they state "that they do severally, and not one for the other, absolutely release and discharge the said Lopez from all claims, causes of action in law or equity," &c.

The release was signed and sealed by L. T. Potter, per attorney, and by about forty other individuals, creditors generally.

The following special releases were signed. By the Bank of the State, as follows:—The President and Directors of the Bank of the State of South Carolina, (as holders of sundry notes, of which David Lopez is maker and not otherwise,) per C. M. Furman, President.

The South-Western Railroad Bank and the People's Bank, by their Presidents, signed releases subject to the same limitations.

The Planters' and Mechanics' Bank signed the release twice. First in the following words, "The P. and M. Bank on note of D. Lopez, endorsed by J. F. Church, per C. G. Memminger." The other, as follows: "The Planters' and Mechanics' Bank of So. Ca. on note of David Lopez, endorsed P. M. Cohen & Co., dated 3d January, 1855, at sixty days, two hundred and fifteen dollars, and also for note of David Lopez, at sixty days, endorsed by W. J. Bennett, for four hundred and seventy-five dollars."

The plaintiff, in reply, proved a demand on the trustees, made by Potter, after he had taken the note from Bank, and before he transferred it to plaintiff, and the refusal of the trustees to pay any dividends on the note in suit, upon

Charleston, January, 1858.

the ground that the Bank *had* not released upon this note, and that L. T. Potter *could* not, he not being a creditor upon the note on 10th April.

The report of his Honor, the presiding Judge, is as follows:

"The foregoing statement, prepared by counsel, is correct.

"The case having been submitted to me as one turning on a point of law, I agreed with the defendant, and ordered a non-suit, with leave for plaintiff to move to set it aside.

"I considered the release of the Bank unimportant—for that I thought was confined to the debts specified in it. But the release of Potter and his subsequent payment and application for a dividend on this note, I thought should be so connected as to make the contingent liability, which the debtor was under to him, at the execution of the release, an actual, subsisting debt. In this view Potter was the creditor, and the bank was his agent for collection."

The plaintiff appealed and now moved this Court to set aside the non-suit upon the grounds:

1. Because it is respectfully submitted that his Honor erred in ruling that the release executed by L. T. Potter, and the special release of the Planters' and Mechanics' Bank, operated as a full release to the defendant, Lopez, of all claim upon the note in suit.

2. Because it is respectfully submitted, that his Honor erred in ruling that the Planters' and Mechanics' Bank in releasing all claim as to the notes specially named in the release which it signed, necessarily released also all claim as to the note in suit.

3. Because it is respectfully submitted, that the Planters'

Guynemer vs. Lopez.

and Mechanics' Bank *did* not release the note in suit by its special release, and that L. T. Potter *could* not have done so on the 10th April, 1855.

Mowry and Shaffer, for appellant.

Campbell, contra.

The opinion of the Court was delivered by

WARDLAW, J.—This case has been submitted almost without argument, certainly without the citation at the bar of any authority on either side. The Court has examined it with as much care as time would permit, and with some division, sustains the ruling made on the circuit. For authority reference is made to the cases of *Coe vs. Hutton*, 1 Serg. & R. 408; *Cuyler vs. Cuyler*, 2 Johns. 186; *Pierce vs. Parker*, 4 Met., 90; *Reed vs. Tarbell*, 4 Met., 95. No doubt is entertained that the indorser of a note existing in the hands of a holder, may by apt words release all right of action which by subsequent payment of the note such indorser might acquire against the maker. The doubt is felt only as to the construction of the release made by Potter, the indorser in this case. Does it so plainly include his inchoate right in the note of Lopez indorsed by him, that without intent found by the jury, the Court should say that such right is barred? A majority of us think that the words "claims and causes of action in law or equity" are so comprehensive as to cover an indorser's contingent demand against a maker; and that the intent must be collected from the paper, and could not be the subject of extrinsic evidence.

Under this view, the right of the present plaintiff, derived from Potter after the release, was barred. Potter must be considered at the time of his action, as a creditor whose cause of action had not yet become complete; and the sub-

Charleston, January, 1858.

sequent completion of it by his payment to the bank, must have relation back to the release so as to constitute the contingent liability of the maker to him a debt by promissory note. The assignment, although it speaks of ratable division among creditors, expresses "a proportion to their respective debts," by note, bond, &c., wherein the assignor is principal debtor; and is just as if it had directed a division amongst such notes, bonds, &c., according to their several amounts. The bank, holder of the note now in question, could not have been expected to release the indorser by releasing the maker; and it would be contrary to what seems the intention of the assignment to hold that the sole indorser could not by acceptance and release, entitle this note to a share of the assets to be distributed, without previous payment of the note in full.

The motion is dismissed.

WITHERS, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

Huguenin vs. Legare & Colcock.

JULIUS G. HUGUENIN vs. LEGARE & COLCOCK.

Factors—Mistake—Insuring.

Where factors, under a clear mistake as to the law, wrote to their principal that they had sold his cotton, when in fact there was a mere agreement to sell not binding under the statute of frauds, and authorized him to draw by reason of the sale—he having previously expressed a wish that his factors should never advance for him—and the cotton having been burnt the next day, again wrote that they had sold the cotton and that it belonged to the purchaser at the time it was burnt: *Held*, in an action for the value of the cotton sold, that the factors were not liable to their principal.

The factors *held* not liable for not insuring, the jury finding upon doubtful evidence that they were under no agreement to insure.

BEFORE WARDLAW, J., AT CHARLESTON, JUNE TERM,
1857.

The report of his Honor, the presiding Judge, is as follows:

“Assumpsit by a planter against factors, to recover for fourteen bales of Sea Island Cotton, which were sent by the former to the latter for sale, and were accidentally burnt in store without insurance.

“In several counts, the plaintiff claimed money for cotton sold, money received by defendants for his use, and damages for the defendants breach of their undertaking to procure insurance.

“A summary statement of the case exhibited by the evidence is as follows:

“The defendant, John Colcock, before 1843, and from that time until 1852, conducted a factorage house in Charleston alone; in 1852 and afterwards, the defendant, James Legare, was his partner. The plaintiff's business was divided

Charleston, January, 1858.

between this house and another. In all the time from 1843, till January, 1854, there were sold in this house, of the plaintiff's cotton five hundred and twenty-three bales, amounting to fifty-five thousand dollars.

"Before 1852, Colcock never kept any general policy of insurance, nor ever procured insurance of any cotton sent to him without special instructions from the owner. After 1852, Legare & Colcock usually kept a general policy, by which cotton, to the amount of thirty thousand dollars was insured, and which within that amount might have been applied to cover the loss of any cotton burnt in their possession.

"In January, 1853, the defendants had on hand a lot of plaintiff's cotton, consisting of — bales; before its sale they received, February 5, 1853, twenty-four bales more; 1854, March 14, they sold twelve bales; 1855, January 14, plaintiff sent thirty-five bales to them; 1855, March 4, ten bales more, stained; 1855, December 8, fourteen bales, (*now in question*;) 1855, December 23, nine bales; 1856, January 6, eleven bales were sent. The evidence particularised no more. In the accounts of sales rendered to the plaintiff, insurance was charged upon the twelve bales sold in March, 1854, and upon the thirty-five bales sent January, 1855, and sold March 4, 1855; but no other charge for insurance appeared. The defendants showed that, even when they had a general policy of insurance, some of their customers choosing rather to run the risk than pay insurance, were not charged insurance, and that the account sales of thirty-five bales, March, 1855, was made out by a clerk somewhat inexperienced and inaccurate, who had in other instances inserted the charge for insurance in accounts rendered to customers, who, as he had been instructed, were not to be charged insurance; but the plaintiff showed that the account as to the thirty-five bales was copied by another clerk, experienced and confidential, and that both accounts were transmitted

Huguenin vs. Legare & Colcock.

under cover of letters written by Mr. Colcock, one of the defendants.

"The fourteen bales sent 1855, December 8, were in two or three days received by the defendants, and they directed the wharfinger of Commercial wharf to store them. The wharfinger stored them, 11 December, 1855, in an old brick store-house, ordinarily used for storing cotton; and in the night of Saturday, January 5, 1856, this store-house took fire from some cause unknown, and it, and no other building, was burnt. All the cotton then in it was burnt too; about two hundred and fifty bales; amongst which were the fourteen bales in question; eighteen bales belonging to the defendant Legare; fifteen belonging to members of his family, and various parcels belonging to fourteen or fifteen customers of the defendants.

"The defendants paid all of their customers for cotton lost, except the plaintiff and a sister-in-law of Mr. Legare's. Their policy had expired several months before the fire, and had not been renewed.

"On Thursday, January 8d, 1856, Mr. Colcock offered the fourteen bales to one Morse, a transient but responsible cotton speculator, who made a bid on it, the first bid that had been received for it. Later in the day, R. H. Colcock, nephew of the defendant C., and chief clerk of the defendants, offered to take Morse's bid, and Morse said he would take the cotton. Next day, Friday, bills of sale were made of this cotton to Morse, and of nine other bales of plaintiff's cotton sold in like manner to Green, and these bills were, as usual, copied into the books of the defendants. The bill for Morse was put on file in the office of the defendants, where Morse, having no office in Charleston, had requested that bills for him should remain until he called. A previous sale had been made to him by the defendants, and the same course had been taken. Of this cotton no order to the wharfinger, or other evidence of ownership had been de-

Charleston, January, 1858.

livered to Morse; he had paid nothing, and had received nothing. It is not the usage to give an order on the wharfinger before the purchaser desires to remove the cotton—the order then given is dated of the day of sale. But it is usual to re-weigh cotton if the purchaser desires it; and R. H. Colcock testified that, in this instance, Morse had the right to re-weigh, and to examine the conformity of the cotton to the samples which were exhibited to him.

“Monday or Tuesday after the fire, Morse declined to receive the bill, saying that he would stand a lawsuit, and that he had requested the bill to remain with the defendants on purpose to avoid responsibility until the cotton was shipped.

“Green paid for his cotton, which had been burnt too.

“The defendants, January 11, 1856, commenced an action against Morse, making the present plaintiff, plaintiff there.

January 4, 1856, the defendants addressed to plaintiff a letter, dated, by mistake, December 4, 1855, in these words:—

Charleston, December 4th, 1855.

“JULIUS G. HUGUENIN, Esq.

“DEAR SIR:—We sold this morning your nine bales Fair, at twenty-nine cents, to James F. Green & Son, and your fourteen bales G., to E. J. W. Morse & Co., at thirty-four cents. As soon as these cottons have been examined and re-weighed, we will send you the account sales. In the meantime, if you desire it, you will please draw on us for what funds you may require.

Yours very truly,

(Signed.)

LEGARE & COLCOCK.

14 Bales G.

“375, 368, 369, 886, 356, 370, 370, 375, 375, 856, 883, 866,

Huguenin vs. Legare & Celcock.

403, 338, at thirty-four cents per pound—one thousand seven hundred and sixty-four dollars and sixty cents.

"A few weeks after the fire, the plaintiff and the defendant C. had a conversation in Charleston, in the presence of Col. Drayton. The plaintiff complained that C. had paid other persons for cotton burnt, and would not pay him. C. said, "You never told me to insure your cotton." Plaintiff—"I tell you to do it now." Plaintiff said he was entitled to be paid, as "you have charged me insurance." C.—"I did it once, and that by mistake." Plaintiff—"You know my father in his lifetime did my business in town. He never ordered his cotton to be insured, and I didn't mine. He thought it cheaper in the long run not to insure."

"After plaintiff's return home, he wrote a letter to defendant, dated January 21, 1856, in which he spoke of two accounts he had found, in which he was charged insurance.

"The defendants answered, January 25, acknowledging the accuracy of the plaintiff's discovery, and saying that the cotton was Morse's when burnt; and if the case commenced against him should be decided in his favor, the defendants would consider their obligation, with a sincere desire to do justice.

"The plaintiff having been advised by Mr. Petigru, that the suit against Morse could not be maintained, and that the defendants could sue Morse in their own names, was unwilling that the suit which had been commenced should be carried on at his expense, and directed it to be discontinued. It was discontinued, and this suit commenced.

"Besides the letters above mentioned, the defendants exhibited letters from the plaintiff to them: four dated in 1853, nine in 1855, and one January 6, 1856. The last mentioned gave information of eleven bales of Godley cotton sent. Sale ordered, as plaintiff needed funds by the middle of January. This cotton was sold February 8, 1856, *and insurance charged*, according to the instructions given in the pre-

Charleston, January, 1858.

sence of Col. Drayton. Most of these letters contain urgent instructions for sale. January 31, 1853, plaintiff says, 'I have never derived any benefit from holding cotton.' February 5, 1853: 'Sell immediately on arrival:' twenty-four bales then sent. February 6: 'Sell immediately, on receipt of this, cotton you may have in hand, without delay. The twenty-four bales sell on arrival.' February 11: 'Sell immediately. Let me have account sales by return of mail. I never wish factors to advance for me.' January 14, 1855: Thirty-five bales sent: 'Sell immediately upon its receipt.'

"January 17: 'Want thirty-five bales sold immediately, as funds wanted to buy negroes.'

"January 18: Negroes bought. 'Can I draw for one thousand dollars, before cotton sold? I hope cotton sold?'

"February 11: Sell at twenty cents. 'Pay bills, and deposit balance.'

"March 4: 'Conclude it is best for you to sell for the best price it will bring. Ten bales sent. *Sell soon as landed* for what it will bring. Close sales immediately.'

"March 11: Account sales of thirty-five received, ten not sold. 'Close sales immediately upon the receipt of this.'

"December 8, 1855: Fourteen bales of Owen's cotton sent, marked G. 'You will please give me your opinion on it, and make an early sale.'

"December 23: Nine bales sent: 'I must be in funds early in January. Endeavor to effect an early sale of my cotton on hand.'

"December 30, 1855.—'Sell the two lots of cotton on hand. I wish to be in funds by the 8th or 10th of January, at which time I expect to be in Charleston to meet my engagements.'

"There was testimony that it was often impossible to sell cotton without storing it.

"The facts of the case were submitted to the jury. The question of fact which I thought most worthy of attention

Huguenin vs. Legare & Colecock.

was this:—Did the circumstances shown by the evidence authorize a just expectation on the part of the plaintiff that the cotton, subject of this suit, would be insured by his factors, or, in other words, did these circumstances establish an implied agreement of the defendants to procure insurance of the cotton? Both forms of the question, in my opinion equivalent, were repeatedly used,—the former more frequently, because it coincided with the plaintiff's expression in his letter of January 27, 1856, and with the phrase which was adopted at the bar in the argument.

"Did the defendants agree, sale or no sale, to be answerable for a certain sum, was another question which, if decided in the plaintiff's favor, must have carried the case for him:—but the letters and argument, mentioned in the first ground of appeal, did not incline my opinion on this question to the plaintiff's side,—much less did they induce me to hold that upon law, without regard to facts, the decision must be for the plaintiff. If there was no valid sale of the cotton to Morse, (as I thought there was not, under the statute of frauds,) the defendants' letter of January 4, 1856, by reference to examination and re-weighing showed that the term "*sold*" had been misapplied to an incomplete transaction; and I could not venture to say, without the aid of the jury, that instructions of the plaintiff given more than two years before, were so present to the mind of the defendants when they wrote this letter, that their unlimited offer of credit to the plaintiff in the *meantime*, between the letter and the completion of the sale, should be construed into an agreement to be answerable, in all events, for a certain sum. The inference from this letter, which the plaintiff insisted on, I submitted to the jury:—and this letter, as well as the charges of insurance, various extracts from other letters, and circumstances noticed on either side, I directed attention to; in reference to what I considered the main question, as before stated.

"The jury found for the defendants."

Charleston, January, 1858.

The plaintiff appealed, and now moved this Court for a new trial, on the grounds :

1. Because the letter of 4th January, 1856, from Legare & Colcock to the plaintiff, announcing the sale of the cotton and authorizing him to draw, taken in connection with the letter of plaintiff to Legare & Colcock, of 11th February, 1858, in which he says that he does not wish them to advance to him unless they have funds of his in hands, authorized the plaintiff to regard the sale as concluded, and made the defendants liable to him whether their sale to Morse was complete, or not. Whereas his Honor charged the jury to the contrary thereof.
2. Because it was proved that in two instances in 1854 and 1855, the defendants had charged the plaintiff with insurance, and that the plaintiff had allowed and paid the same; and this was equivalent to an express direction to insure.
3. Because his Honor said to the jury, that if they thought the two charges of insurance raised a just expectation on the part of the plaintiff that he would be insured thereafter, they should find for the plaintiff. Whereas, it is submitted that the instruction should have been, that these two charges, made and allowed, did raise an implied assumpsit or obligation to insure thereafter, without reference to what the plaintiff expected or did not expect.
4. Because if the charges of insurance were by mistake, it was the mistake of the defendants; and if the general policy taken out by them in 1855 was allowed to expire, it was their default, and the responsibility should rest in law where the mistake and the default were.
5. Because the verdict was contrary to law and evidence.

Huguenin vs. Legare & Colcock.

Porter, for appellant, cited *Story* on Ag. 123; *Lefever vs. Lloyd*, 5 Taun. 749; 1 *Liverm.* on Ag. 401; *Chit. on Con.* 18; 1 *Parsons* on *Con.* 69; 2 *Wash. C. C. R.* 132; *Russ. on Factors*, m. p. 270.

De Treville, contra, cited *Paley* on Ag. 17, 19; 6 *East*, 614; 2 *East*, 471, n; *Paley* on Ag. 7; *Story* on Ag. 123.

The opinion of the Court was delivered by

WITHERS, J. The plaintiff's claim was founded upon fourteen bales of Sea Island cotton, sent to the defendants, as factors, on the 8th December, 1855, received in two or three days by them, stored by the wharfinger, and burned on the night of Saturday, January 6, 1856.

Of three counts in the plaintiff's declaration, one is for money had and received to the plaintiff's use, which, being wholly unsupported by any proof, may be laid out of view.

One other count is for the value of the fourteen bales of cotton sold by the defendants.

It is earnestly contended that this count is sustained by the evidence. We must, therefore, examine that question.

On the 4th January, 1856, the defendants addressed a letter to the plaintiff, saying as follows: "We sold this morning your nine bales fair at twenty-nine cents, to James F. Green & Son; and your fourteen bales G. to E. J. W. Morse & Co., at thirty-four cents. As soon as these cottons have been examined and re-weighed, we will send you the account sales. In the mean time, if you desire it, you will draw on us for what funds you may desire." A list, containing weights of the fourteen bales respectively, was enclosed, footing up, at thirty-four cents per pound, seventeen hundred and sixty-four dollars and sixty cents.

Charleston, January, 1858.

Again, on the 25th January, the defendants said, in a letter to the plaintiff, "as your agents we sold your cotton to Mr. Morse *before* the fire, and it was his cotton and not yours, when it was burnt, and he owes you for it; but as he refuses to pay we have ordered him to be sued." They did sue him in the plaintiff's name, and he ordered the action to be discontinued.

If this were all the evidence, upon the count for cotton sold, it would maintain it. But notwithstanding the parties verily believed the cotton was actually sold to Morse, it was a clear misconception, too obvious to any legal mind, which adverts to the Statute of Frauds and Perjuries, to warrant any discussion. On the 3d January, Morse made a bid for the cotton, and the principal clerk of the defendants agreed to accept it. Next day, the 4th January, a bill of sale of this cotton to Morse was made, and being entered in the defendants' books, as was usual, was placed upon their file—Morse paid nothing—received nothing—signed no memorandum of the bargain. The cotton was to be examined, to ascertain conformity to samples; and to be re-weighed. It was, in no sense, delivered. There was, then, in point of fact, no sale, according to law. And the plaintiff's counsel is quite too much skilled in the law, to think, or to contend, that there was; but he insists that the letters already cited, connected with the fact, that they authorized the plaintiff to draw upon them by reason of the sale announced, and considering his letter to them of 4th February, 1853, that he never wished to draw in advance of funds in their hands, authorized him to regard the sale as made, so far as he was concerned, however the matter might be as between the defendants and Morse: (*Vide* first ground of appeal.)

To test this upon general reasoning, let us consider that on the 4th January, 1856, the plaintiff was still the owner of the cotton, in the hands of his agents, (these defendants,) and

Huguenin vs. Legare & Colcock.

could have controlled the disposition of it. If the defendants were liable to him for the value of the goods, they must have been so whether the fire had destroyed it or not; they must have been liable whether it was actually sold or not, because they said it was, and thought so. Suppose it had not been destroyed, and that Morse had failed, or refused to take it, whose cotton would it still have been? The plaintiff's undoubtedly. He could have directed it to be holden for a higher price; he could have withdrawn it, upon paying liens, from the custody of the defendants, and placed it in other hands. He could have the enhanced value of it, if it had been sold to some other, on default or failure of Morse, for forty instead of thirty-four cents per pound. So that it was not the transaction with Morse that caused the plaintiff's loss, but the fire, for which no blame or liability is imputed to the defendants. The only case cited in support of the count now under consideration is that of *Le Fevre vs. Lloyd*, adm'r, 5 Taunt. 748, (S. C. 1 Com. Law R., 250,) and that case is clearly distinguishable from this. A broker to sell, had sold and delivered the goods, and drawn on the purchaser in favor of the owner of the property, at two months, and remitted the bill to the plaintiff. It was dishonored by the drawee, and the broker would have assumed the ground that he, as the drawer, was in law the plaintiff himself, for he only did what the plaintiff, if present in London (the place of the transaction), would himself have done, in the usual course of such transactions. The broker was held responsible, as drawer, upon this bill, for these reasons: the broker, by drawing this bill, put an end to all doubt as to the buyer's responsibility. The vendor, upon receiving it, in consequence of his good opinion of Lloyd, the defendant, dismissed from his mind all care about the solvency of the purchaser. The distinguishing facts in that case are obvious; the goods were actually sold and delivered, and as a substi-

Charleston, January, 1858.

tute for them, and as a clear indication that the transaction was closed, a bill was remitted and received, and relied on. Here nothing of this kind was done; no damage accrued to the plaintiff in the negotiation with Morse, called a sale by mistake; his goods remained in possession, and subject to his order; he did not draw for the proceeds, and thereby incur any liability. If he had done so, 'tis unnecessary for us to consider now what law would have thereupon arisen.

So it must be evident that the jury having found against the plaintiff upon the count for cotton sold, under proper instruction from the Court, is not matter of just complaint.

We think, with the presiding Judge, that the claim for damages for default to insure was the strongest position of the plaintiff, and perhaps if he had persuaded the jury to be with him on that ground, we should have left the result undisturbed.

But it was necessarily a question for the jury, and there was no misdirection. Whether the defendants had committed a breach of contract, in that respect, was matter for inference from circumstances proved. When we remember, that in the course of eleven years more than five hundred bales of cotton were sold by Colcock, and by him and his co-partner for the plaintiff, amounting to so much as fifty-five thousand dollars, and but two instances of a charge for insurance were shown, and but one of them was admitted to have been intentionally made, and the last of them in January, 1855, about a year before the disaster which gave rise to this action; that there is no evidence of instruction, at any time, to insure; that the general tenor of the plaintiff's letters of instruction was to direct an instant or a speedy sale; that in an interview, after the destruction of the cotton, Colcock affirmed that they were not told to insure, and the plaintiff, not disputing that, said, "I tell you to do it now." Considering such facts as these, we should consider ourselves unwar-

Huguenin vs. Legare & Colcock.

ranted in reversing the verdict of a jury, having such a basis to rest upon.

Though regretting the misfortune of the plaintiff, we must adhere to the legal rights of the parties, and recognise the proper function of the jury ; and are constrained, therefore, to refuse the motion in this cause, and

It is ordered accordingly.

WARDLAW, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion refused.

Charleston, January, 1858.

WILLIAM RYAN vs. JAMES COPES.

*Nuisance—Danger—Loss—Verdict—New Trial—
License.*

In an action for a private nuisance in erecting and working a steam cotton-press, it is sufficient to allege, increased danger from fire and liability of boilers to explode, thereby rendering plaintiff's dwelling unfit for habitation, and impairing the value of his property, though the actual occurrence neither of a fire, nor of the explosion of a boiler, is alleged.

If a jury say, in their verdict, that they find upon certain counts, but their assessment shows that they had reference to other counts, the judgment will not, it seems, be arrested if the other counts are valid, although the counts upon which the verdict was expressly found should be declared insufficient.

A contradictory verdict, showing that other counts were considered besides those upon which the verdict is expressed upon its face to be found, is, it seems, good ground for a new trial.

New trial granted, because material allegations were not proved.

Though in determining whether a steam cotton-press is a private nuisance, a license from the city council to erect and work the press, will, as evidence, be entitled to high consideration, yet it is not conclusive, for the annoyances occasioned by the press may have been so great that the council could not legalize them; or it may be shown that the license was abused, and that the annoyances complained of were not the necessary incidents of a steam cotton-press, and, therefore, were not protected by the license.

BEFORE WARDLAW, J., AT CHARLESTON, MAY TERM,
1857.

The report of his Honor, the presiding Judge, is as follows:

"Action on the case for a private nuisance, commenced March, 1856.

"The declaration, (which will be before the Court,) contains four counts. The first, complains that the plaintiff,

Ryan vs. Copes.

being possessed of a lot in Church street, in the City of Charleston, where he lived, the defendant had erected, on a contiguous lot, a cotton press, worked by steam, wherein he compressed bales of cotton: and in consequence of the smoke, soot, dirty water, noise and vibration thereby occasioned, the plaintiff's habitation had been annoyed.

"The second, with slight variations from the first, complains of defendant's having caused the erection of a steam press, to the consequent annoyance of the plaintiff's habitation.

"The third, states the erection of the steam press with furnaces, as before, and the keeping by defendant of large quantities of cotton on his lot, contiguous to the plaintiff's, and complains that thereby the plaintiff's house was made more liable to fire, the cost of insuring it increased, and its value diminished.

"The fourth, is like the third as to the press and furnaces, and complains that the plaintiff's house has thereby been rendered unsafe and incommodious, and the lives of himself and family endangered, by reason of the liability of the defendant's boilers to explode.

"A summary of the evidence will be found in the following statement:

"The lots of the two parties (which are mentioned in the declaration,) are on the square which is bounded east by Church street, north by Chalmers' street, south by Broad street, and west by the City Hall Park. The plaintiff's house is a two-story wooden building, fronting about twenty-four feet on Church street—his lot has an additional front of about six feet, which is occupied as a gateway; and it is ninety feet deep. At the south-west corner of Church and Chalmers' streets is a large brick house belonging to A. McKenzie.

"The defendant's lot has a front of one hundred feet, or thereabouts, on Chalmers' street, west of McKenzie's house,

Charleston, January, 1858.

in which front there is an entrance from Chalmers' street; and, passing round McKenzie's house, it has a front with an entrance on Church street, between McKenzie's and the plaintiff's; and running back of plaintiff's it has another front and another entrance on Church street, south of the plaintiff's—so that defendant's lot is north, west and south of plaintiff's. It is about two hundred and ninety-eight feet deep on the south line, running back from Church street, and is all under roof. West of it is the large brick building, extending from Broad street to Chalmers' street, which was formerly Stewart's hotel, and is now owned by McKenzie, of which the northern end, fronting on Chalmers' street, is occupied by the Federal Court and its offices. On Church and Broad streets, south of defendant's lot, are the Charleston Library and some other valuable buildings. On the square east of Church street and opposite to that above described, are a bank and other valuable buildings, worth half a million, amongst which is a building purchased by the defendant a year or two ago, which passes round a large house on the south-east corner of Church and Chalmers' streets, and has an entrance on each of those streets.

“On the east side of Church street, a square below Broad street, is another cotton-press, where cotton is compressed by steam, and is occasionally stored in large quantities. Still another steam press is yet lower down, between Church street and the Bay. Another is on the north side of Hayne street, in the rear of the Charleston hotel, and some more are in the city, nearer the water. At all of the presses provision is made for keeping a number of bales of cotton, in such way that they may be easily reached and handled.

“The defendant's lot was for many years used as a large livery stable, and so was the lot east of Church street, which he lately purchased as above mentioned. There is still a livery stable on the east side of Church street, opposite to the south part of defendant's lot, and another on the north

Ryan vs. Copes.

side of Chalmers' street, opposite to the Federal Court rooms. Whilst the defendant's lot was used for a stable, Otis Mills stored one thousand one hundred bales of cotton in it for three months, without complaint from any body. He obtained the consent of the insurers, but did not ask that of the council. There is no city ordinance forbidding the storing of cotton, or confining it to particular localities.

"In 1850, the defendant bought his lot and spoke of erecting a press on it. About the same time McKenzie bought Stewart's hotel, influenced, as he said, by a desire to prevent the erection of the press, not because of any hostility to the defendant, whom he did not then know, but because of his opinion that a press is a nuisance, and a livery stable not.

"An Ordinance of the City Council of Charleston, (of which an abstract must be printed with this report,)(a) pre-

(a) The Ordinance is as follows:

"An Ordinance to regulate the erection of Steam Engines and Machinery, propelled by steam within the city. Ratified 11th day of January, 1845. J. SCHNIEBLE, Mayor.

"Sec. 1. That from and after the passing of this Ordinance, no steam engine, or machinery impelled by steam, shall be erected or established within the limits of the city of Charleston, unless the building or buildings in which such steam engine or machinery may be contained, shall be constructed of brick or stone, and paved or floored in the story wherein the same may be placed, with some incombustible material, and the roof of such building be covered with tile, slate, or metal, with the chimney of such height as in each instance may be satisfactory to the City Council: nor unless the erection and establishment of such steam engine, or machinery, be approved of by the City Council, as hereinafter provided for.

"Sec. 2. Whenever any person or persons, body or bodies, corporate or polite, shall desire to erect a steam engine or machinery, within the limits of the city, as aforesaid, he or they shall submit to the City Council the plan and specifications in detail of the proposed steam engine or machinery; and it shall be the duty of the Mayor to examine such plan, and the contemplated site, and report thereon to the City Council, who shall then determine upon the expediency of granting, or refusing permission for the erection or establishment of such steam engine or machinery.

"Sec. 3. It shall not be lawful at any time, or times hereafter, to use or burn as fuel in the furnace of any steam engine or machinery, erected, or established within the city, under the authority of this Ordinance, or in any fire-place constructed for the purpose of heating the boiler thereof, any material or substance

Charleston, January, 1858.

scribes regulations for steam engines in the city, and subjects all such engines to the supervision of the council, and to removal if that should be deemed necessary. 1850, September 17, Copes & Black, (the defendant, and a partner then associated with him) applied to the council for leave to erect a steam cotton press on the premises in question. September 25, their memorial, containing more exact specifications of their design, was presented; and, also, a counter memorial, signed by the plaintiff, McKenzie, Paul & Brown, Klinck &

other than coals, of the quality commonly called Anthracite coals; and any person or persons, body or bodies, corporate or politic, who shall hereafter use, or burn as fuel, in any such furnace, or in any fire-place constructed for the purpose of heating the boiler of any steam engine, or machinery, erected within the city, under the authority of this Ordinance, any material, or substance, other than Anthracite coals, as before mentioned, shall forfeit and pay the sum of one hundred dollars, for each day, or part of a day, fuel of any other material or substance than Anthracite coal shall be so used or burned therein.

"Sec. 4. Any person, or persons, body or bodies, corporate or politic, who shall erect, or establish any steam engine, or machinery impelled by steam, within the limits of the city, contrary to any of the provisions of this Ordinance, and without having previously obtained the consent and approbation of the City Council as aforesaid, shall forfeit and pay the sum of one thousand dollars; and any person or persons, body or bodies, corporate or politic, who shall use, employ, or impel by steam, or work any such steam engine or machinery, erected and established, or to be erected or established within the city contrary to this Ordinance, shall forfeit and pay the sum of one hundred dollars for each day or part of a day, the same shall be used, employed, impelled by steam, or worked.

"Sec. 5. The City Council shall appoint a committee from their own body, to examine at any and at all times into the situation and condition of any steam engine or machinery, with its appurtenances, erected under the authority of this Ordinance; and, also, the building and buildings in which the same may be established, and if such committee shall think such steam engine or machinery, with its appurtenances, or building, dangerous to the neighborhood, from liability to accident from fire or explosion, arising from defects in the construction, or otherwise, they shall report thereon to the City Council, who are hereby empowered and required to order the same, or any part thereof, to be pulled down, altered, or removed, in such a manner and within such reasonable time as Council may deem expedient. And in case the owner of such steam engine or machinery, with its appurtenances, shall refuse or neglect to pull down, alter, or remove the same, or such part thereof, in the manner and within the time specified in such notice, the City Council shall cause their order thereon to be carried into effect, at the expense of such owner, to be recovered in the City Court, or other Court having jurisdic-

Ryan vs. Copes.

Wickenberg, the Bank of the State of South Carolina, the Charleston Library, and other owners of real estate in the neighborhood. October 1, the Mayor reported to council that the defendant's plans were in conformity with the ordinance, and his petition was granted. October 15, a letter of remonstrance from the vestry of St. Philip's Church, was presented to the council, and the counter-memorial again urged. The vote on the petition of defendant was reconsidered, and a special committee of the council raised for the examination

tion; and such owner shall further forfeit and pay a sum not exceeding one thousand dollars for every such refusal or neglect, and likewise the sum of fifty dollars for each day such steam engine or machinery shall be used, employed, impelled by steam, or worked, after the expiration of such notice, before such alteration, correction, or removal shall be effected.

"Sec. 6. The City Council shall appoint a committee to examine at any and all times into the situation and condition of any steam engine or machinery, and their appurtenances, impelled by steam, and the buildings in which the same are contained, already erected and established within the city, and take such proceedings thereon, in every particular as is authorized on the part of the City Council and its committee in the fifth section of this Ordinance; and all the penalties contained in that section shall be applicable and enforced against, and upon the owner of such steam engine or machinery, with their appurtenances and buildings connected therewith, in the same manner and to the same extent as is provided in the said fifth section.

"Sec. 7. All fines and forfeitures incurred by the violation of this Ordinance, shall be sued for and recovered in the City Court, or any other Court having jurisdiction, one-half thereof for the use of the person who shall prosecute the offender to conviction, and the remaining moiety for the use of the city."

"An Ordinance to regulate the storing, keeping and piling of Cotton, &c. Ratified Aug. 15, 1844.

"Sec. 1. *Be it ordained*, That it shall not be lawful for any person, or persons, to store, keep, or pile within the limits of the city, in any building not constructed of brick, or stone, and covered with tile, slate, tin, or other incombustible material, or on any lot of land enclosed, or unenclosed, or enclosure, situate to the westward of East Bay street and south of Boundary street, cotton, loose, or in bales, or bags, of any quantity, or number whatever. Any person, or persons storing, keeping, or piling cotton, loose, or in bales, or bags, in any building, lot of land, enclosed, or unenclosed, or enclosure, within the city, contrary to the provisions of this Ordinance, shall forfeit and pay a sum not exceeding one hundred dollars, nor less than twenty dollars, for each day such cotton, loose, or in bales, or bags, shall be so stored, kept, or piled."

Charleston, January, 1858.

of the subject. November 5, a report of the special committee was made, setting forth that defendant had made contracts and commenced the work, and urging arguments in favor of his scheme. The committee was discharged, and (as Mr. Chapman, an alderman, testified without objection,) the leave prayed for by defendant was granted.

"Soon afterwards the press was put into operation. Twenty-five or thirty laborers were usually employed about it. It was carefully managed under competent superintendents and engineers, and no fire had proceeded from it, except that one night, a fire, which was soon extinguished, broke out in some cotton stored in immediate proximity to the plaintiff's lot;—whether this proceeded from a spark which fell upon the cotton before it was brought in, or from fire, that accidentally, or designedly, had been set through the plaintiff's fence, was not made manifest, although testimony on the subject was offered by both parties, and it seemed that one or the other of the explanations here suggested was supposed to contain the truth. The defendant's lot—that on which the press stood, might possibly contain two thousand bales of cotton, but so great a number there would be very inconvenient. He fitted up the lot opposite, which he lately purchased, for storing: and in both he sometimes had fifteen hundred bales—usually much less—of late late three or four hundred. Church street, near to the plaintiff's house, was frequently much blocked up by drays bringing cotton to the press, and taking it away, and by bales rolled over from one of defendant's lots to the other.

"The press stands near to the western end of defendant's lot, not far from the wall of Stewart's hotel.

"The boiler, seventy or eighty feet from the press, is within three or four feet of the back line of plaintiff's lot, parallel with a high brick wall, which, after the fire above mentioned, the defendant built on the line. Near to the south-east corner of plaintiff's lot, stands a tall brick chim-

Ryan vs. Cepes.

ney, with which the furnace communicates, and within six or eight feet of it a tall wooden chimney, or tube, into which the *exhaust* pipe, extending eighty-two feet from the engine, is discharged.

"When a bale of cotton is received by the press and when it is discharged from it, there is the usual puffing sound, which is made by every high pressure steam engine, and some vibration. At the end of each operation is a discharge of steam, which being condensed in the exhaust pipe or in its chimney, descends in a perceptible form in certain states of the weather, especially in the morning.

"This is perceived and felt in the plaintiff's lot and house, when the wind concurs with other conditions to make it fall there. Witnesses differed very much in their representations of the degree of annoyance which was thus occasioned to the plaintiff, but there were some who spoke of the falling water or vapor, as a *shower*, and of soot marks left by it. The condensed steam is pure, but some of it may have, in passing, come in contact with soot in one of the chimneys. The fuel, which has always been used, is ordinarily anthracite coal, which makes very little smoke or soot: but every morning some pieces of pine wood have been necessarily used for kindling, and these produce much black smoke and soot. One intelligent witness, who was well acquainted with steam engines, whilst he knew that the discharge of steam was indispensable in the use of every steam engine such as the defendant's, thought that some arrangement of the pipes and chimnies might be made to prevent the fall on the outside of any condensed vapor.

"The plaintiff bought his house fifteen years ago, for three thousand dollars—a few years ago re-painted it, and substituted slate for the old shingles on the roof:—paid taxes according to an assessment, which rated it at two thousand four hundred dollars, until 1854, when the assessment was raised upon most of the real estate in the city, and upon this

Charleston, January, 1858.

house became three thousand four hundred dollars. The insurance paid by the plaintiff before the erection of the press, was one per cent.—afterwards it was raised to one and a half, and then upon the recovering reduced to one and a quarter. The insurance has been raised upon all other property in the neighborhood—upon some, not until 1856. The cotton press was assigned as a reason. In the opinion of various officers and agents of insurance companies, cotton presses were of themselves extra hazardous, like drug stores, livery stables and buildings devoted to some other such employments: but the accumulation of cotton added greatly to the risk.

“Defendant before the recovering of plaintiff’s house offered four thousand dollars for it: plaintiff asked six thousand dollars, certainly a high price.

“As to the true value, there was, of course, a variety of opinions, and a variation according to the times. The plaintiff’s lot was worth more to the defendant than to any body else:—about the house it seemed that defendant did not care. One witness thought the value of the house so much reduced by the press that it was worth nothing to any body but the defendant—another thought that the press had increased the value and raised the price of this house, and of all other property in the neighborhood by the increased business and activity which it brought. On one occasion the plaintiff congratulated a neighbor upon the exemption from contagious diseases, which he thought the press had occasioned.

“The plaintiff kept a boarding house. Some of his boarders apprehended the bursting of the boiler: and some had been annoyed by an unpleasant mist, a stunning noise, and a disagreeable vibration; but none had left the house for any of these causes. A delicate female, who lived in Broad street, between the Library and the Hotel, had suffered from the

Ryan vs. Copes.

noise of the press, and this, with other reasons, had induced her removal to a more quiet residence.

"I held, that the drays in the streets, and the accumulation of cotton on the eastern side of Church street, should not enter into the consideration of the jury, as they were not covered by the declaration: That five years' acquiescence of the plaintiff, if found, did not bar the plaintiff's action at law, whatever might be its effect in equity: That a private nuisance must be a disturbance of another's enjoyment of his real property, specially hurtful to the plaintiff, and must be material, substantial, considerable, as distinguished from an offence to the taste of the refined, or to the nerves of the delicate: That the question of nuisance, or not, must be much affected by place and surrounding circumstances, so that what would be a nuisance in the country, would not be so in a city, and what would be a nuisance in one city, or one part of a city, would not be so in another: That the City Council of Charleston could not legalize conduct which was of itself unlawful, but as to an exercise of the right of property, which was harmless of itself, and liable to become wrong only by reason of locality, or excess, it could make regulations which would conclude the city, and all citizens who hold property subject to the authority which had been granted to the Council: That therefore the action of Council, [if it was (as the defendant contended,) found to be a license and approbation of defendant's conduct in erecting a steam cotton press in the place in question, granted regularly, according to a city ordinance,] took from the plaintiff all right to complain, except to the Council, of that press and of all the necessary incidents to its operation, such as boilers and noise:—but that such incidents of a licensed press as had not been expressly approved, and might result from misconstruction, or mismanagement, or might be dispensed with, or advantageously modified, might become nuisances if they annoyed the plaintiff. Under this head attention was directed to the accumu-

Charleston, January, 1858.

lation of cotton at the press, and the inquiry was suggested, whether this had been considered by the Council or was a necessary incident of a cotton press in Charleston; and more especially attention was directed to the showers of condensed steam, sometimes blackened, which some of the plaintiff's witnesses had spoken of. Had they been approved by the Council? Were they necessarily incident to a press? Could they have been prevented, or by a different arrangement made innocuous?

"After a long absence, the jury returned with a verdict in the following words, viz. 'We find for the plaintiff on the third and fourth counts, and damages to the amount of four hundred dollars: also, recommending that the exhaust pipe be altered, so as not to throw any water on the plaintiff's premises. William Wragg Smith foreman.' I thought that the jury had misapprehended the statements of the several counts, and the effect which would result from their verdict. Indeed, I thought the verdict contradictory; for whilst under the finding applicable to the third and fourth counts, incidents, inseparable from steam engines, were regarded as a nuisance, and so by successive actions, based on this finding, the engine would have to be removed, the recommendation of the jury contemplated the continuance of the engine under some alteration. I explained to the jury, as I had before attempted to do, the effect of such a verdict, and suggested a reconsideration, with a view to the change of phraseology.

"The plaintiff's counsel earnestly remonstrated against any interference with the jury acting within its province; and an irregular discussion arose as to what the counts contained, and what the verdict meant. During this, the foreman of the jury said to the bench, that he had consulted his brethren, and that they understood their verdict, and did not desire to make any change. Thereupon I directed the verdict to be recorded."

Ryan vs. Copes.

The defendant appealed, and now moved this Court in arrest of judgment, on the ground,

Because the verdict finds for the plaintiff upon the *third* and *fourth* counts in the declaration only: and the matter alleged in those counts contains no cause of action, and is insufficient in point of law to sustain a judgment in favor of the plaintiff.

And failing in that motion, then for a new trial, on the grounds,

1. Because the defendant erected the said steam cotton press under the authority and sanction of the City Council of Charleston, and according to the manner and plan specified by the City Council of Charleston, and upon the site approved of by them, and in strict compliance with all the requisitions of the City Ordinance, ratified in January, 1845.

2. Because it is competent for the City Council of Charleston, under their charter, to confer the right to erect and work steam cotton presses, and to keep and store cotton, in the City of Charleston, and that such a right when conferred and lawfully exercised, cannot be a nuisance.

3. Because there was no proof of negligence, or excess of power on the part of the defendant; and if any damage did occur, necessarily resulting from the lawful exercise of the defendant's rights of property, he is not answerable for it.

4. Because, notwithstanding the increased rates of insurance on plaintiff's house, it was in evidence that the said premises had been assessed by the city from the year 1854 to 1857, at a valuation of three thousand four hundred dollars, and before that time at two thousand four hundred dollars;

Charleston, January, 1858.

that the consideration paid by the plaintiff for said property was three thousand dollars; that he had repeatedly, since the erection of the press, been offered four thousand dollars for it, but held it at six thousand dollars—that four thousand dollars would be considered more than its value, even if the press were removed from its neighborhood; that the officers and agents of insurance companies testified that steam cotton presses involved no greater risks of fire than drug shops, paint shops, grain and fodder stores, livery stables, and many other trades usually found in a city.

5. Because, suffering the defendant to erect the said steam cotton press, and to embark capital to a large amount in it, and to continue to work it for five years and upwards, without taking any step to restrain him, or to redress himself, was equivalent to an acquiescence on the part of the plaintiff.

6. Because steam cotton presses in the City of Charleston, are under the special supervision and control of the City Council, who may, under the aforesaid ordinance, of January, 1845, "pull down, alter, and remove them whenever they may deem it expedient."

7. Because the finding of the jury is contrary to the direction of his Honor on a point of law.

8. Because no substantial nor special damages were proved.

De Treville, for appellant.—The acts charged in the third and fourth counts are not *per se* a nuisance. They are lawful in themselves, and if they have become a nuisance the plaintiff should have alleged what has rendered them so—whether they have become so from want of care, or from

Ryan vs. Copes.

negligence in working the machinery, or in keeping the cotton, or from any other cause. Whatever has occurred to render a lawful act a nuisance is the *gist* of the offence and should appear of record. *The People vs. Sands*, 1 Johns., 78; 1 Chit. Pl. 423. The circumstances growing out of the acts of the defendant, which have occurred to disturb the plaintiff in the enjoyment of his estate, should have been particularly laid, and not left to inference;—otherwise the jury may find an act to be a nuisance, which in itself, apart from extrinsic circumstances, is not a nuisance. The mere apprehension of danger, and the possibility of injury are not sufficient to found an action for a nuisance upon. 1 Johns., 78; 3 Atkyns, 750; 1 Chit. Pl. 423; *Hess vs. Upton*, 7 Ohio, 217, cited in 1 Selwyn, N. P. 460, (note.) Acts authorized by law cannot be a nuisance, and if, in the reasonable exercise of them, injury results to another, it is *damnum absque injuria*. The verdict of the jury then, in this case, is either capricious, or it assumes the existence of facts which neither appear in the record nor in the evidence. A. A. 1783, 7 Stat. 98; 10 Rich. 491; Walker's Dig. City Ord. page 2; 18 Barb. 241; 10 id. 360; 5 Rich. 588; Sedgwick on Dam. 30, 31, 110, 111; 4 Comstock, 195; 1 Chit. Pl. 148. No actual damage to plaintiff was proved—the value of his property may even have been enhanced. No sale of it was lost—it was never put in the market. Insurance is not a necessary, but a voluntary expense, and ought not to be included in the assessment of damages. *Watts' case*, 22 Eng. C. L. Reports, 281; *Harsh vs. Butler*, Wright, 99, cited in 2 Selwyn, N. P. 1122, (note.) If from want of care, or by negligence, the acts of the defendant have become dangerous to the plaintiff, the City Council are empowered to arrest them—and to this body he should apply for redress. City Ord. 1844 and 1845.

Hayne & Miles, Magrath, contra.

Charleston, January, 1858.

The opinion of the Court was delivered by

WARDLAW, J. The motion in arrest of judgment, assuming that the verdict for the plaintiff has been rendered on the third and fourth counts only, and is in effect a verdict for the defendant on the first and second counts, requires the sufficiency of the third and fourth to be examined.

The third, analyzed more carefully than has been done in the report, will be found to complain that the defendant, in the City of Charleston, wrongfully and injuriously erected buildings on his lot, contiguous to the dwelling house of the plaintiff, and therein wrongfully and injuriously, carried on, and still carries on, the business of pressing cotton bales by machinery worked by steam, and called a steam cotton press, to which are appurtenant, furnaces, boilers and large fires; and therein kept, and still keeps, large quantities of cotton, an inflammable material, easily ignited and difficult to be extinguished: by which means the dwelling house of the plaintiff is subjected to increased risk of fire, and *thereby* rendered insecure, unsafe, uncomfortable and of less value, and he required to pay higher rates of insurance, and prevented from insuring for so large an amount.

A summary outline of this count is as follows: The wrongful acts of the defendant have increased the risk of fire, and that risk has destroyed the security and comfort of the plaintiff's habitation, depreciated the value of his property, and subjected him to increased expense of insuring.

The fourth count complains in like manner of the wrongful and injurious erection and working of a steam cotton press, contiguous to the plaintiff's dwelling, with furnaces, boilers, and fires appurtenant: by which means, and by reason of the liability of the said boilers to explode, the dwelling of the plaintiff has been rendered unsafe, incommodious, and unfit for habitation, the lives of himself and family jeopardized, and he in the enjoyment of his dwelling annoyed and **damnified**.

Ryan vs. Copes.

Here the erection and working of the press, and of boilers liable to explode, constitute the injury: the danger to the dwelling and its inmates, is the intermediate result, and the destruction of the comfort of the habitation *thereby* produced, is the damage.

In considering this motion in arrest of judgment, we must keep to the counts in question, and can know nothing of the action of Council or of any other matter in the evidence. *Wrongfully and injuriously* preclude all legal cause of excuse. We must by intendment in support of the verdict, pre-suppose the perfect allegation and satisfactory proof of all facts which are defectively stated, and of all that are plainly inferrible from what is stated. In a general allegation of wrongful conduct, followed by alleged damage, we must disregard the omission of intermediate particulars, by which effect was given to the conduct. (Willes, 583, *Winsmore vs. Greenbank*.) We may in this way be led to say, in reference to the third count, that, by proximity of the large quantities of cotton to the large fires, the risk was increased; and in reference to the fourth, that the boilers were more than ordinarily liable to explode, to occasion the danger and consequences alleged. Risk of harm by fire in one count, and risk of harm by explosion in the other, are the immediate consequences laid, from which loss is alleged to have ensued; and upon either count the question comes at last, whether a plaintiff, without ever having endured the actual occurrence of a threatened evil, may found an action, upon the danger to which he has been exposed from the chance of the evil, and the hurtful consequences thence resulting to him. I do not put the question, whether danger will suffice without actual loss; for in this case actual loss—a dwelling made unfit for habitation and the value of property depreciated—is alleged, as the proximate and natural consequences of the danger wrongfully produced.

In 1752, Lord Hardwicke, upon a motion made by private

Charleston, January, 1858.

individuals, (*Anon.* 3 Atk. 750,) after considering the circumstances of the case, refused to grant an injunction to stay the building of a house, intended as a house in which to inoculate for the small pox. He held that if the house should be a nuisance it would be a public one, and that the proper method of proceeding would have been by information in the name of the attorney general: that bills to restrain nuisances must extend to such only as are nuisances at law, and it had not been settled that a house for the reception of inoculated patients was a nuisance—on the contrary, upon an indictment of that kind, there had then lately been an acquittal. He remarked that, “the fears of mankind, though they may be reasonable ones, will not create a nuisance,” and that, “it is in the nature of terror to diffuse itself in a very extensive manner.” These remarks only are important now:—the point adjudged resting upon circumstances and observations outside of them.

Fears may be reasonable, yet be in truth groundless. They denote the impressions made upon the mind by appearances, and those, even when well suited to mislead the judicious, sometimes vary widely from the reality. Actual danger differs from both the fear of an evil, and the evil that is feared. It may exist, and those exposed to it be unconscious of its existence. When it has been perceived, the loss occasioned by it is more substantial than a painful emotion of the mind.

Fifteen years after Lord Hardwicke's refusal of an injunction to prevent the establishment of a house for inoculation, so little were such houses dreaded, when they were well kept, that upon an indictment for keeping one, the Court, although it would not quash upon motion, directed a demurrer. (*Rea vs. Sutton*, 4 Burr. 2116.) Later cases, even after the use of vaccination was generally introduced, have sustained indictments for the public exposure of a small-pox patient, upon principles which extend to all contagious disorders, and illus-

Ryan vs. Copes.

trate the distinction between danger and fear. (*Rex vs. Vantandillo*, 4 Mau. & Sel. 73; *Rex vs. Burnett*, 4 Mau. & Sel. 272.)

In the *People vs. Sands*, 1 Johns. R. 78, an indictment for keeping near a public street a house with a large quantity of gunpowder in it, to the danger of inhabitants and passers, and to the common nuisance of all the community, was held insufficient, because there was no statement of carelessness or unsuitableness in either the house or the keeper, nor any other allegation of special circumstance in time, place or manner showing the danger, and nothing could be intended in aid of an indictment. Yet all the judges who so held were of opinion that if by proper allegations the danger had been exhibited, the indictment would have been found. Kent and Livingston, two of these judges, (although the former adverts to the general disrepute in which 12 Modern is held,) both notice and approve what is attributed to Lord Holt, (*Anon.* 12 Mod. 342,) where he is said to have held, upon an indictment for keeping powder, that to support the charge there must be *apparent danger or mischief already done*. *Apparent*, if it was used by Lord Holt, must have been here used in its sense of *plain—indubitable*, not in that of *seeming—not real*.

The cases which have been mentioned all related to public nuisances. The one before us is an action on the case for an injury, which, whether called a private nuisance or not, is alleged to have occasioned actual loss by depreciation of property and annoyance of habitation: and the question resolves itself into this, whether this loss is made no legal damage, by the circumstance that it has come through the intervention of danger produced, and not of evil actually endured. If common danger may constitute a public nuisance, why should not peculiar danger maintain an action for the special loss it has occasioned? Any tainting of the atmosphere, any offence to the sense of smelling, any immission of disagreeable substances, however subtle, perceived by the

Charleston, January, 1858.

senses, may give cause of action:—a deleterious substance, not perceptible to the senses, as miasma from decaying vegetables, or mercury in a gaseous form, differs only in evidence. If its actual existence and penetration of a house, and its dangerous nature can be established, it will appear to affect the health and annoy the habitation, in kind if not in degree, the same as gas from coke-works, or from a manufactory of sulphuric acid, would do. Upon this motion in arrest of judgment, the reality of the danger and the harm it has done, must be taken as proved. In questions before a jury, fears would be disregarded until sufficient grounds for them had been shown, and in all cases a high degree of probability that the evil dreaded would actually occur, would be required to constitute actual danger: although of extreme ills less chance might be expected to be endured, than of ills whose probable consequences would not be so disastrous. Real danger of great ill no prudent man would abide, and therefore it may be legally considered to produce the losses which the fears of it, and the efforts to avoid it, occasion. Between it and the hazard, which may excite fear, but which the constant man becomes habituated to forget, there is a difference similar to that which the law recognises between an assault and an insulting gesture: and between the real danger and the evil already happened, not more difference than between an assault and a battery. It is not to be conceived that one might build a powder mill near to the habitation of another, without giving cause of action before an explosion; nor that one might, without incurring responsibility in a private action before he had caused the burning of his neighbor's house, keep in an open space near to that house a great fire in the midst of barrels of turpentine. It is true that every one must be allowed reasonably to use his own, although some annoyance may thereby be occasioned to another: and it is true that some increase of the risk of fire is brought upon a house by any other wooden house placed

Ryan vs. Copps.

near it, more especially if some dangerous trade is carried on in the said house, or its occupant is a careless person; and for such increase of risk a plaintiff should not obtain a verdict. But if in such a case, an action should be brought, and upon the allegation of wrongful erection by the defendant, and of danger thence produced from which damage had resulted, a verdict for the plaintiff should be found, a motion in arrest of judgment would meet with difficulties, which neither a demurrer nor a defence on the merits could have encountered.

The determination of the Court to refuse the motion in arrest of judgment, has been somewhat fortified by the manifest reference to the first and second counts, which the jury have made by their recommendation concerning the exhaust pipes. It is not altogether clear that the ejections from the pipe, which are not at all mentioned in the third and fourth counts, did not enter into the assessment of damages, although the jury say that they find for the plaintiff on these counts. If in truth, other counts, less questionable, were considered in the assessment, the judgment ought not to be arrested even if the counts said to be found for the plaintiff were insufficient—especially as there is no express finding of the other counts for the defendant.

Coming, then, to the motion for a new trial, we might rest the grant of it solely upon the contradictory nature of the verdict, which has been pointed out in the report. In a matter of so much importance, it should not be uncertain what the jury meant. As the grounds of appeal do not, however, allude to the form of the verdict, we look beyond this. We do not find in the evidence any proof as to some of the facts which, in our consideration of the former motion, were taken as proved. Neither dangerous proximity of the cotton to the fire, nor any special liability of the boilers to explode, is in the testimony of any witness. The danger either of fire or of explosion does not appear to have lessened the number

Charleston, January, 1858.

of inmates in the plaintiff's house, nor to have brought its price much below the double of the City assessment. There is no evidence concerning smoke, soot, and vapor. These might possibly have been prevented in the working of the defendant's machinery: whether they would have been or not, the plaintiff was not bound to endure them, if they exceeded those unavoidable annoyances, which in a crowded part of a city, every one must suffer from his neighbors' use of their own. These, if so excessive, and if not necessarily incident to a steam cotton press, have not been licensed by the City Council; if so incident, could not have been licensed unreasonably to annoy the plaintiff:—for in that case, they constituted in themselves violations of his absolute right, which the Council could not legalize.

The steam engine is not of itself a nuisance. So common and valuable has it become, that public policy suggests caution in doing what may interrupt its use. But in reference to an engine itself, and to any useful machinery propelled by it, there is justice in holding that one set of citizens should not be burdened or annoyed for the benefit of others. In view of the different conclusions about nuisance reached by the law, according to differences of place, of modes of proceeding, and of other circumstances, it is wise that every business, where necessary incidents are likely to annoy the neighborhood in which it is conducted, should be subject to such regulations as may make it comparatively harmless. And in the City of Charleston, where rulers are elected by those over whom they exercise authority, and are entrusted with large powers by the legislature, it would have been strange if steam engines had not attracted the notice of Council. The ordinance concerning them, which the defendant has adduced in his behalf, is one which the Court would most unwillingly restrain. Under it and the action of the Council, he may well say that his cotton press has been licensed, and that its continued existence affords evidence of

Ryan vs. Copen.

its continued approval. But every license, express or implied, may be abused, and the license does not sanction the abuse; as, for instance, a license to retail spirituous liquors is no bar to an indictment for keeping a disorderly house. Actual damage done to the plaintiff, and not excused under the circumstances by the law, cannot be justified by the license of the Council: but in considering whether his neighborhood was a fit one for a cotton press, whether he has been unreasonably endangered, and whether the annoyances from the defendant's business arise to such degree as to constitute a private nuisance, (which are in some measure questions of opinion,) the action of the Council is, as evidence, entitled to higher estimation than the opinions of private individuals. The mayor and aldermen are the representatives of the City, and a citizen who has made an investment under their authority, after consulting them in a matter entrusted to their judgment, should not be readily found guilty of doing wrong by creating danger which they do not apprehend, or producing annoyances which they do not perceive.

The motion for a new trial is granted.

WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

New Trial ordered.

Charleston, January, 1858.

E. N. FULLER, ET AL., vs. J. E. EDINGS, ET AL.

*Property taken for Public Use — Compensation —
Damages.*

Where the Legislature directs land to be taken for a highway or other public use, and provides a mode by which the damages to the owner shall be estimated and compensation made, the party entering under the Act is not a wrong-doer, and the mode provided must be pursued.

Where the owner of a plantation owned a private wharf which yielded him a considerable income, and the Legislature authorized a public wharf to be made near the private one, on the same plantation, and directed the appointment of commissioners to estimate the amount of compensation which should be made to the owner "for the value of the premises taken for public use, as well as for the damages generally to the same:"—*Held*, that the owner was not entitled to compensation for the damages he might sustain for the loss of income from his private wharf.

BEFORE GLOVER, J., AT CHARLESTON, FALL TERM, 1857.

The report of his Honor, the presiding Judge, is as follows:

"The 12th section of 'an Act to establish certain Roads, Bridges and Ferries,' passed Dec., 1856, (12 Stat. 506,) provides, 'that E. N. Fuller, Edward W. Seabrook, Edward H. Baynard, Ephraim S. Mikell, Thomas A. Baynard, Ephraim C. Bailey, Joseph W. Seabrook, Oliver H. Middleton, James E. Whaley, and Ephraim M. Seabrook, or such of them as may act in this behalf, be authorized and empowered, at their own expense, to build and construct a road and wharf, from a point at or near the mouth of Cuthbert's Creek, to the main public road on Edisto Island, and to appropriate for a landing place, connected with such wharf, such quantity of land, not exceed-

Fuller vs. Edings.

ing one acre, as they may think fit; which road, wharf and landing, when completed in a good and substantial manner, to be approved by Commissioners of Roads for St. John's, Colleton, shall be for the public use for all the people of this State, and shall be kept in repair from time to time by the inhabitants of said Island, under the direction of the Commissioner of Roads for St. John's, Colleton. Provided, that before entering upon the land of Miss Mary Seabrook, or the estate of William Seabrook, or of John Hannahan, if he be so minded, compensation be made for such road and landing, by the said E. N. Fuller, and other petitioners, or a majority of them, to the owner, or to the purchasers, in case any of the land be sold in the meantime, for the value of the premises taken for public use, as well as for the damages generally to the same, to be estimated in the same manner, and subject to the same right of appeal, as is provided in case of lands taken for the construction of railroads authorized by law.'

"E. N. Fuller, and others, named in the Act, petitioned for a Commission, setting forth, that since the passing of the Act, the land in question, belonging to the estate of William Seabrook, had been purchased by Joseph E. Edings, and that they were ready to pay the price that might be awarded for compensation and damages, but could not agree with him or Miss Seabrook as to the amount.

"Whereupon the Court made the following order:

"It is ordered that Commissioners be appointed to assess the compensation to be made to Miss Mary Seabrook and Mr. J. E. Edings, for the lands and privileges to be taken in pursuance of the Act of Assembly referred to in the petition in this case, and that George A. Trenholm, Charles M. Furman, Thomas F. Drayton, T. B. Lucas, and James W. Gray, be appointed the Commissioners. That the said Commissioners, before they act, take an oath, faithfully and impartially to execute the duty assigned them, and that they take into consideration the value of the premises to be taken for public

Charleston, January, 1858.

use, as well as the damages generally, or the loss which may occur to the owners in consequence of the land being taken, the proceedings of the said Commissioners to be certified to the Court, with a full description or plat of the land in question.'

"At October Term, 1857, the Commissioners made the following return:

"In obedience to the said order, we, the Commissioners therein appointed, certify to the Court, that we proceeded personally to the place and inspected the lands in question, and after taking the oath prescribed, and hearing Counsel and the testimony on both sides, respectfully submit the following as the result of our deliberations.

"First. As to the land of Miss Mary Seabrook, through which the road passes, as well as that cut off from the body of the tract, we ascertain the quantity from the plat, No. 1, herewith certified to, to be 6 0354-10,000 acres, that the extent required to be fenced is 1100 yards, at a cost of \$350 per mile, and we award to Miss Mary Seabrook as follows, viz.

For 6 acres, at \$70 per acre,	-	-	\$420 00
For 1100 yards, at \$350 per mile, 1760 yards,			218 75
And for keeping up Fences every ten years,			
at present allowance of			312 50

Amounting to	\$951 25
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"Second. As to the lands of Mr. J. E. Edings, through which the road passes, as well as that cut off from the body of the tract, we ascertain from the Plat, No. 2, the quantity to be 5 0532-10,000 acres, and that the extent required to be fenced is 1552 yards, at \$350 per mile.

"But the Commissioners, or a majority of them, cannot agree as to the general result of the compensation which ought to be awarded to Mr. J. E. Edings.

We all agree that he is entitled as follows, viz.

 Fuller vs. Edings.

For 5 acres, at \$70 per acre,	-	-	-	\$850 00
For 1552 yards of fencing, at \$350 per mile,	308	63		
For a sum to keep up fencing every ten				
years,	-	-	-	440 90

Amounting to \$1099 53

“But two of the Commissioners are of opinion that this ought to be the extent of the compensation awarded to him.

“Two others of the Commissioners are of opinion, that in addition to that sum Mr. Edings ought to be allowed for the loss of the income, at eight hundred and twenty dollars per annum, to his private wharf, in consequence of the establishment of a public wharf immediately contiguous and on Mr. Edings' plantation, a present sum which at 7 per cent. would realize that rate of income annually. So their award would be, viz.

For lands, as before,	-	-	-	\$ 1099 53
For income lost,	-	-	-	11700 00

Amounting to \$12799 53

“And, lastly, only one of the Commissioners is of opinion that in addition to the allowance for the land, it would be more equitable to allow a sum which would realize that rate of income for a definite period, as for seven years or a life, which would be thus, viz.

For land, as before,	-	-	-	\$1099 53
For the income of \$820 per year, for				
seven years, the present value,	-			4661 34

Amounting to \$5760 87

G. A. TRENHOLM,
C. M. FURMAN,
THOS. F. DRAYTON,
T. B. LUCAS,
J. W. GRAY,
Commissioners.

Charleston, January, 1858.

"In behalf of the demandants it was argued that the return of the Commissioners, assessing the damages sustained by J. E. Edings, should be confirmed, so far as they had agreed in their estimate of the value of the land taken, and of the damages to the plantation; and that the land be dedicated to public use, on paying to the said J. E. Edings, the sum of one thousand and ninety-nine dollars and fifty-three cents.

"It appeared to me that a majority of the Commissioners had not agreed on any estimate of damages, unless the loss of income from his private wharf should not be an element in their calculation of damages. I was of opinion that the loss of income from his wharf, might be assessed under the provision of the Act, and proposed the appointment of new Commissioners, which demandants have declined, unless with instructions."

The demandants appealed, and now renewed in this Court their motion for confirming so much of the return of the Commissioners as they all agreed in,—to wit, the value of that part of the land which is taken, and the damage done to the rest of the plantation by taking it, and for rejecting from the calculation of damages, the effect which a public landing may have on other interests of defendant.

Petigru & King, for appellants.

1. A public landing, like other rights of toll, is in the hands of government, a branch of prerogative; in the hands of an individual, a franchise; which is not alienated by the grant of the soil; and which it is competent for the public to exercise though all the land on the coast or river be in private hands.

2. The duty of making compensation for private property taken for public uses, is the same in this as in other cases;

Fuller vs. Edings.

and applies to the resumption by the State of what the State has already granted; but here the State has never granted any thing but the land. For resuming the right to that land compensation is due; but there is no room for compensation where the State takes nothing but its own; much less can an individual be heard to complain of injustice because he is not paid for the interest which he has in preventing the government from exercising its rightful prerogative for the common good.

8. The profit made in the way of toll for a landing, road, or bridge not chartered by the State, is a precarious right, depending entirely on the non-exercise by government of the rightful duty of the State, and is not such property as comes within the meaning of the rule, that private property shall not be taken for public use without compensation.

4. The several Railroad Acts for regulating the way in which compensation is to be made for private property taken for railroads, follow the same distinction; and make no allowance for any property, but land, or a right of way over land; or for any damages, but damage done to the freehold. And the Edisto Act proceeds, professedly and expressly on the same grounds.

5. The claim set up by J. E. Edings for compensation, on account of the effect which a public landing will have on his opportunities of profiting by the absence of a public landing, has no support from the action of the legislature, in the matter; and is in itself unreasonable, unjust, and unprecedented.

Campbell, contra.

The opinion of the Court was delivered by

WHITNER, J. The report of the Circuit Judge very fully

Charleston, January, 1858.

presents the facts upon which the judgment of this Court is asked. We are not entirely without embarrassment as to some questions of a purely technical character presented by the form of proceeding as well as the stage at which the adjudication of this Court is demanded touching the real controversy in this case.

The Commissioners have made a special return in virtue of the order of the Court at a preceding term, and our first inquiry is whether this is in fact such a report as will warrant any further step toward an adjustment of this contest or whether the commission is yet unexecuted.

By the terms of the Act of Assembly, 1856, (12 Stat. 506,) authorizing the construction of the road in question, an assessment is directed "in the same manner and subject to the same right of appeal as is provided in case of lands taken for the construction of railroads authorized by law." The parties on either side, as we are informed, submit to be governed by the provisions of Act of Assembly, 1828, section 10 (8 Stat. 359), as to mode. This Act, No. 2443, comprises one of our earliest railroad charters, and satisfactorily defines the manner of proceeding in such cases, and to this Act, therefore, we refer. By its terms, amongst other things, the Commissioners are charged to "state particularly the nature and amount of each" item assessed by them. The minute detail thus required is essential in view of the interest to be effected, the right of the parties and an intelligible adjustment of the matters involved.

The Commissioners "could not agree as to the general result of the compensation which ought to be awarded to the respondent, J. E. Edings." To a certain extent, however, they "all agreed," and the nature and amount of each item they have *particularly stated*, amounting in the aggregate to one thousand and ninety-nine dollars and fifty-three cents. Two of the Commissioners were of opinion this ought to be the extent of the compensation, whilst the remaining three

Fuller vs. Edings.

Commissioners were of opinion a further allowance should be made for the loss of the income to his private wharf in consequence of the establishment of a public wharf immediately contiguous and on the same plantation, though as touching this interest, these three Commissioners could not agree amongst themselves as to amount. There is no dispute about the facts on which this question rests, and it becomes a question of law, therefore, whether this item should be excluded, and if excluded, whether this Court is furnished with a statement setting forth the entire compensation to which the respondent is entitled. If on the other hand the respondent is entitled by law to compensation for this alleged loss, the Court is not yet furnished with a report as to the proper valuation, and the matter must be recommitted to the same or other persons to obtain such valuation.

Before entering upon the consideration of this question, however, it is proper to say a word in reference to another point which arises—the right of appeal. The Act provides that in case either party to the proceeding shall appeal from the valuation to the next session of the Court granting the Commission, and give reasonable notice to the opposite party of such appeal, the Court, upon satisfactory proof that the appellant has been injured by the said valuation, shall order a new valuation to be made by a jury who shall be charged therewith in the same term, and their verdict shall be final and conclusive between the parties *unless a new trial shall be granted.*

We would in no way trench upon the province of the jury by a premature judgment; but it is manifest that we have here a proceeding very analogous to a special verdict, and the facts are conceded to be before us. There is no intimation of any dissatisfaction by either party as to the compensation allowed on the enumerated items which all the Commissioners agreed to estimate, neither is there any intimation of any matter omitted which according to the Act should be em

Charleston, January, 1858.

braced in the return. To this complexion, then, the case must come at last, and if the Court should decline an opinion under the circumstances, on the main and only remaining question in dispute, when thereby the whole case may be disposed of, it might be censurable as lending itself to a bootless litigation. To all, except those to whom litigation is a luxury, it would seem appropriate in just such a case to avoid unnecessary delay and consequent accumulation of expense, and put an end to this strife so far as may be by a calm and dispassionate consideration of the only question open to controversy.

When the legislature authorizes the laying out of a highway, or the establishment of other works deemed by them to be of public necessity and convenience, or when in their opinion it is for the public benefit, and in the construction thereof, damages are supposed to result to the property of others, and a mode is provided by statute for the assessment and payment of the same, the party so authorized is not a *wrong doer*, and the *remedy* for the person injured is confined to the *mode* provided by the statute, and none exists at common law. 1 Am. Railway cases, 168; 11 Mass. 864; 12 Mass. 446; 4 Wend. 667.

Such is the case and such the relation in which the parties stand before us, and the Act of Assembly, 1856, already referred to, constitutes the law of the case.

We do not understand that any objection is raised as to the province of the legislature thus to provide for the public exigencies. The enterprises of the last half century have rendered the doctrine very familiar and no longer questionable, even in a class of cases widely different from that now under consideration.

The road and landing here authorized are for the free use of all the people of the State, and when constructed, though at the expense of the demandants, is to be kept in repair by the inhabitants of the island, and under the direction of the

Fuller vs. Edings.

commissioners of the roads. It is not, therefore, to be a source of private emolument to be enjoyed by those who incur the charge of its construction. It is open to all, though few may contribute. The Act contains the following proviso: "Before entering upon certain lands" designated, "compensation is to be made for such road and landing" by the demandants "to the owner, or to the purchaser in case any of the land be sold in the mean time, for the *value of the premises taken* for public use, as well as for the *damages generally to the same*, to be estimated in the same manner, and subject to the same right of appeal, as is provided in the case of lands taken for the construction of railroads authorized by law." The *value of the premises taken* has been satisfactorily estimated, and certain items have been also estimated in which the parties acquiesce, presumed to be included under the terms "damages generally to the same."

To render more intelligible the position of parties and the precise nature of the interest, it is proper to state that subsequent to the Act of Assembly, 1856, the respondent purchased the land in question, and shortly after his purchase entered into an agreement with the master of a steamboat trading to Edisto Island, whereby for a term of years the respondent was to receive annually the sum of eight hundred and twenty dollars, with some service as a carrier, equal to an additional sum of one hundred dollars, for the use of this landing, with an understanding at the same time that the contract should be discharged on the completion of the road and wharf. It is proper to add to this statement the fact that the preceding proprietor had occasionally permitted a similar use of the landing, for which a sum of money was paid. The site selected for the wharf is at least half a mile distant from the landing, so that there is not by actual contiguity any interference with the parcel of land or means of access. The effect of a wharf and road open for the public and without charge will be readily perceived, and it is the loss of income

Charleston, January, 1858.

for the future for which respondent claims compensation, and which three of the Commissioners sought to measure, varying in their estimates from four thousand six hundred and sixty-one dollars and thirty-four cents, to eleven thousand seven hundred dollars, making a difference of more than six thousand dollars.

Does such an interest or expectation fall within the purview of the Act? Is it a thing to be compensated for by the public before the usual privilege of access to a common highway may be had? - Is it a thing into which the elements of a fair and just contract so enter as that reasonable estimates may be made, and a fair and just price be demanded and paid?

The question of franchise does not arise, no exclusive privilege has been conferred, and before that would have been done the Supreme authority would have exacted a corresponding obligation. The analogy, as far as it holds, is rather against the claimant, as he insists on shutting out a common use, until he is compensated for the exclusive privilege he sets up, though with the next breath, if he pleases, he may deny all participation or enjoyment by others in his private wharf, and at any charge. The contract into which the respondent has entered since his purchase and since the Act of the Legislature, should not be permitted to introduce a new element. The principle involved in the demand, if well founded, should justify its maintenance, although no such contract existed. The interest then to be protected would almost vanish into thin air. It might, then, be a right to levy contributions, but no customers might present themselves to be taxed. Thus it is seen that the thing itself, as a source of profit, or subject of compensation, would be of doubtful character. An innkeeper or merchant through whose land a railroad may pass might sustain great loss of custom by the diversion of trade and travel, but in estimating the value of the lands taken for the track and the damages

Fuller vs. Edings.

to the same, such a loss has never yet been compensated, and the difficulties through which these roads have struggled into existence in certain quarters of the State without such amercements is a high evidence of the sense of the country on the subject. Scarcely a road has ever been established without such a consequence, and private interests suffer without any other indemnification than such as result in the general good.

If loss of custom is the proper subject of indemnity, so it would be in every monopoly enjoyed by adventitious circumstances. Take the case that might arise, and has doubtless often. In the navigation of these highways by steamers the landed proprietors enjoy a great monopoly in the supply of fuel, but if a public road and landing should be established, competition would greatly curtail the profits, yet in a case of compensation for injury, such an item would not be tolerated. Competition is destructive of monopolies, and hence it should be encouraged, and although new facilities and improvements occasion great losses on old investments, the wants and necessities of the public should neither be fettered nor taxed to relieve such complaint. Such remedies to individuals would be utterly subversive of the public good, and, therefore, are unreasonable and unjust. The progress of society would be greatly retarded if not entirely restrained by such concessions.

Income from this landing would be as effectually cut off by the selection of a site upon the land of a neighbor as at the point designated, yet it is conceded in such case compensation could not be demanded with any hope of success. If loss of income constitutes a just subject of remuneration, the purpose of the legislature to protect the citizen would have been manifested by terms covering that case likewise.

But we are satisfied that the Act of the Legislature includes no such interest, and compensation, for loss of income from that source, cannot be legally demanded under its provisions. The value of the premises taken for public use, and the

Charleston, January, 1858.

damages to the same, do not imply a remuneration for injuries so remote, vague, and uncertain, and in no way incident to the thing taken, or of damage to the same. "Speculative opinions of prospective injuries" furnish very unreliable evidence on which to base an estimate, and that must be a strong necessity which drives a Court to the adoption of such expedients.

We have already seen that these demandants are not to be regarded in the character of wrong-doers, and though damages are spoken of and compensation provided for, it is not in the light of a wrong done, for which a punishment is to be inflicted, but simply in the light of a fair and reasonable contract in which a fair price is to be paid for private property taken for public use and in promotion of a public good.

This Court is of opinion that the loss of income from the private wharf of respondent, J. E. Edings, in consequence of the establishment of a public wharf immediately contiguous, and on respondent's plantation, does not constitute an item for compensation to be paid by the demandants under the Act of the Legislature in virtue of which they are authorized and empowered to build and construct a public road and wharf, and referred to in these proceedings.

This Court is of opinion that the demandants are entitled substantially to their motion submitted on Circuit, and now renewed in this Court, except so far as the same asks for a confirmation of the return, the order contemplated by the Act being rather that the same be filed to remain of record.

It is, therefore, ordered that the proceedings of the Commissioners, G. A. Trenholm, C. M. Furman, Thomas F. Drayton, T. B. Lucas, and J. W. Gray, and accompanying plat, which have been returned by them to the Court granting the commission, be filed in the office of the clerk of the said Court, there to remain of record, and that the sum of one thousand and ninety-nine dollars and fifty-three cents, which they have all agreed to be a just compensation

Fuller vs. Edings.

for the premises taken for public use and damages particularized in the items which constitute that sum, be considered the valuation of the Commissioners under the order of the Court heretofore made, in exclusion of the other item on the subsequent part of the proceedings spoken of, and which in the judgment of this Court is inadmissible in the estimate of damages contemplated by the Act of Assembly, 1856.

The right of appeal from the valuation herein recognised is reserved according to the mode prescribed by the Act.

WARDLAW, WITHERS, GLOVER, and MUNRO, JJ., concurred.

Motion granted.

Charleston, January, 1858.

WM. H. HEYWARD vs. ROBERT CHISOLM.

*Highway—Pleading—Plea—Justification—Adverse
use—Fence.*

In trespass *quare clausum fregit*, under a plea of justification by reason of an alleged "public highway" over which defendant passed, and from which he removed obstructions, any public way, whether by land or water, and by whatever name called, may be shown.

Adverse use by the public, for more than twenty years, with small boats and occasionally with flats and rafts, of a ditch through a marsh:—*Held*, to establish the ditch as a highway.

Land bounded on three sides by deep water and protected on the fourth, from the intrusion of cattle, by a fence or bank, is enclosed land.

BEFORE MUNRO, J., AT BEAUFORT, SPRING TERM, 1857.

Trespass *quare clausum fregit* for removing obstructions placed by the plaintiff across a cut or ditch. The defendant pleaded that the cut or ditch was a "public highway or water course," &c., for the use of all the citizens of the State through which they had the right at all times "to go, return, pass and repass, with their boats, flats, rafts" &c.; that the said obstructions were wrongfully placed across the said "highway or water-couse" and that the defendant having the right removed the same.

The evidence was as follows:

FOR THE PLAINTIFF.

John P. Mew.—Has lived on plaintiff's place ever since 1841 in the capacity of manager; it was formerly owned by Nathaniel Heyward, plaintiff's grandfather: the place con-

Heyward vs. Chisolm.

tains a large body of lands, with settlements at different points; the only fences are the Combahee and Bull rivers. There is a large body of marsh between the cut and plaintiff's residence; and it is through this marsh that the cut extends. Plaintiff's rice lands are about three miles from the cut; his residence is four or five miles from it. Persons passing through the cut in boats and rafts cannot be seen from plaintiff's residence. Witness obstructed the cut by plaintiff's orders. The water in Bull river is salt; that in Combahee is generally fresh. The ebb tide passes from Bull river into Combahee through this cut. If Bull river was to break into Combahee, the rice culture would be severely affected by salts. It would be dangerous to open the cut wider. It would require a very high tide to pass through the cut in a boat. There is another cut lower down the river which comes into Combahee two or three miles nearer to the mouth of Chehaw river, and would suit the defendant as well as the cut in question.

Cross-examined.—Witness was ordered by old Mr. Nathaniel Heyward to stop all ditches running into Combahee. Witness' attention was first directed to the cut four or five years ago; but at that time flats could pass through at very high water. In 1853 or '54 witness obstructed the cut by plaintiff's order. The suit followed the removal of obstruction.

The tides from both rivers flow over the marsh. The marsh at the cut is not covered by ordinary tides; it requires a spring tide to cover it at that point; the cut is more shallow than before obstructions placed in it.

William H. Mellard, Surveyor.—Witness accompanied Mr. Campbell and located the cut; was at the cut at high water; its depth about fifteen inches, and average width four feet six inches. Does not think an ordinary sized boat could go through it; a small canoe was then aground in it.

Charleston, January, 1858.

FOR THE DEFENCE.

. *Owen Bunting*, examined by commission, dead before the hearing:—

Is eighty years of age; born in North Carolina. After the war his father moved to South Carolina. Has been in Colleton district about seventy years; has passed about Tar Bluff and old Capt. Chisolm's and Capt. Catterfield's; and lived just above Tar Bluff, at Alexander Chisolm's in 1788; used to pass up and down between Combahee place, belonging to Col. Skirving, (now belonging to Andrew Burnett,) and down to Field's Point.

Knows of a cut from the marsh on the opposite side from Tar Bluff into a little river or creek leading up round the island, called Pine island, or Combahee island, (as some called that creek;) and that creek fell into True Blue or Broad river. The small creek he speaks of was what some people called a "gut;" it run up in the marsh and stopped.

First knew it in 1788; it was a small little bit of a ditch then; you could just run a paddling boat.

It was enlarged that same year (in a part,) by Catterfield and an old lady named Mrs. Smith, and a few hands from Mr. Minot's, and two from Arthur Hughes; and in 1789 these same hands cut it out fully so as to pass a four-oared boat. About the finishing it, stopped one end until the ditch got full, so as to force out the loose mud by the hoes stirring it. Witness was living with old Mr. Alexander Chisolm. Mr. Chisolm's hands did not work on it. He did not use it. Witness went at the request of the neighbors, just to be with them; he assisted them; there were other white men superintending the hands. Witness went at the particular request of Major Field; a negro got drowned and they quit. The neighbors used the cut. It was their path to the fishing ground and to get oysters. Mr. Minot's, Mr. Field's and Mr. Hughes' overseers, and Mrs. Smith's son, and Graves used to

Heyward vs. Chisolm.

go over often, fishing and pleasuring. Only knew the cut two years after. Left in 1791 and had not crossed it since. Does not know who owned the land through which the cut run. The cut was, he thinks, over a quarter, and perhaps a half mile long. The cut was made by the neighbors for their use in fishing and getting oysters; and so they used it while witness remained. Witness' employer did not care for such things, and he would not join in the work. But the other neighbors used it for pleasure parties and fish dinners.

Mrs. Mary M. Fripp—also examined by commission:

Knows the defendant; she (witness) is sixty years of age;—knows Combahee island cut. Has known it many years; as far back as 1812, when she was seventeen or eighteen years of age: the cut at that time was bolder and wider than at present, but cannot say what the width and depth then was or what it is now, never having measured it, only judges from comparison. It connects the waters of Combahee and Bull rivers, and its direction is from east to west across the marsh in the neighborhood of Combahee island. Does not know who dug it or for what purpose it was dug.

It was used and is still used by all this neighborhood; sometimes by the citizens of Saltketcher swamp, as she has seen flat loads of shingles going through into Bull river from this river. Every body in this neighborhood uses it; to name one is to name all. The cut has been used by the neighbors ever since witness can remember. Does not know who owned or owns the marsh. Never knew the cut obstructed until within a few years, say two years ago. It has been used by the public for more than thirty-five or forty years without interruption.

Cross-examined.—Witness answers from her own knowledge, not from hearsay. The cut is *through open and unplanted marsh*. It was not nor is it now passable at all times, as it

Charleston, January, 1858.

goes dry at half tides. Don't know why it was made, but it is used for fishing and other pleasure parties, and every other purpose, by those who go over in the direction of Beaufort district. Never knew the cut shut up but once, when she heard it was done by Mr. Heyward. Cannot say how long it remained so. Witness has used the cut so often, it is impossible to say how often that has been. Cannot say she has seen it open every year for the last twenty years, because she has not permanently resided here for that length of time; whenever she came on a visit here before 1842, (when she settled here,) the cut was always open—which has been since 1812.

Charles Minot.—The place marked on Mill's map, "Minot's," was his father's residence, where witness spent the early part of his life; it is near to Tar Bluff. The cut is half a mile obliquely from the Bluff and is called Combahee island cut; it was used nearly forty years ago; people were in the habit of passing through it in boats. It has filled up considerably since. It was used by Saltketcher people in floating shingles through it in order to cut off fifteen miles of dangerous navigation round "Hangman's Point." Thirty years ago witness passed through it in a boat. Six or eight years ago defendant cleaned it out. It was used by people in the neighborhood until within about five years ago.

The Combahee river runs into Bull—the latter is larger, deeper and nearer to the ocean than the former; spring tides overflow the marsh; the cut empties itself for a while into Combahee, then it flows into Bull river. The cut was cleaned out by defendant, Mrs. Fripp, and witness.

Cross-examined.—Plaintiff's residence is, he thinks, four or five miles from the cut, and persons might pass through the cut without being seen from it.

James H. Mallon.—Has known the cut for the last seven

Heyward vs. Chisolm.

years, and during that time has frequently passed through it with a flat. It is a much longer and more dangerous route to go down Combahee then to pass through the cut into Bull river. Once met with an accident going the former route; the cut is called Chisolm's, or Minot's; used it until it was stopped up.

Joseph Heape.—The cut is below Tar Bluff; has heard it called Field's cut; first heard of it twenty-five years ago, and of persons passing through it to Beaufort. In 1850 it could only be used when the tide was high; knew of a flat fourteen feet wide and fifty feet long having passed through it for safety; it is a great accomodation to persons in that neighborhood.

Joseph V. Morrison.—Witness when a boy lived about two miles from Tar Bluff, and once passed through the cut in a boat with Mr. Minot. Witness left that section of the country twenty-three years ago; has no knowledge of the use of the cut by others.

The report of his Honor the presiding Judge, is as follows:

This was an action *quare clausum fregit* for removing an obstruction placed by the plaintiff, in a cut or ditch connecting Combahee river with a creek making up from Bull river. The plaintiff proved possession, and the trespass was admitted.

The plaintiff owned a very large body of land with settlements at several points, and had no other fence than the two rivers. The locality of the cut was some four or five miles from plaintiff's residence and through uncultivated marsh.

The defendant pleaded in justification, that the cut was a public "highway or water course."

The testimony, (hereunto annexed,) showed that the ditch had been cut or widened in 1788, by some neighbors for the

Charleston, January, 1858.

facility of going to fish and get oysters in Bull river. No other act nor any use was proved for more than twenty years after this. From 1812, the witnesses proved its frequent use for boats, and occasionally flats, and in very high tides even rafts; and one of them, (Mr. Minot,) spoke of its having been cleaned out once, perhaps twice.

But no act indicating a continuous claim of right, or calculated to draw the attention of the owner of the land, was proved, until the defendant removed the obstruction, which led to the bringing of this action.

I did not charge the jury on the point made by plaintiff's counsel in the argument, and by his grounds of appeal, namely, "whether the jury could consider any evidence as sustaining the plea, unless it showed one of the two species of highways known to the law,—a road under the charge of the commissioners, or a navigable stream."

In reference to the last mentioned class of highways, I confess that I could not well comprehend how a mere ditch, cut in 1788 for a special purpose and for the accommodation of a few, and when visited by the surveyors in this case, its utmost depth at high water did not exceed eighteen inches, and its average width about four feet six inches, could be ranked as a navigable stream. I did remark to the jury, however, that in order to establish a prescriptive right of way, whether public or private, over the land of another, the use must not only be continuous during the prescribed legal period, but it must also be shown to have been adverse; that is, if the way be through enclosed land the presumption is that it is adverse; but if it be over unenclosed woodland, the mere use of the way, however long, will not confer a right; in the language of the cases on this subject, "the use must be of a character to operate as notice to the owner, that a right was claimed over his land."

There was certainly no evidence in this case, that indicated any such use as implied an adverse claim, or that was calcu-

Heyward vs. Chisolm.

lated to draw the owner's attention by interfering in the slightest degree with his enjoyment of his land.

I doubted then and still doubt if the plaintiff could at any time have brought an action for the passing of boats through the cut, or for any act done up to the time defendant removed the obstruction.

After concluding my charge, defendant's counsel made the point, "that as plaintiff's land was surrounded on three sides by navigable streams, it was enclosed, and therefore the use of the cut for twenty years gave a right," and desired me to charge on it.

I told them that twenty years' use alone would imply adverse claim and confer a right; but that I did not regard a water enclosure such a one as the law contemplated in the rule.

The jury came back into Court *twice*, to ask, "if the law was positive that twenty years' naked use over enclosed land gave a right?"

I replied, yes! I was then engaged in another case and did not repeat my views as to the effect of a water fence.

I am satisfied they did not comprehend my exposition of the rule, and that the finding was predicated on the belief that under my ruling they were bound to consider it "a way over enclosed land, and therefore to be acquired by twenty years' naked use."

I certainly would have instructed them more fully on this point, had it occurred to me that I had been misunderstood; for to apply the rule to enclosures of this kind, would be to substitute a mere formula of words in lieu of the reason.

The cases which lay down the rule proceed on the just view, that passing over *fenced* land necessarily indicates itself to the owner, and is at each passing a trespass. But where the fence is a river the use has no such effect;—boats leave no track, take down no rails, do not injure the soil. The mere rowing through would not constitute a trespass. But

Charleston, January, 1858.

the jury, under, as I think, a manifest misapprehension on this point, found for the defendant, contrary to my view of the law as applied to the admitted or undisputed facts.

The plaintiff appealed and now moved this Court for a new trial on the grounds:

1. Because the defendant having pleaded in justification a "highway," the jury should have been charged that no "highway," could be established from the testimony—and that a public way other than a "highway," though proved, could not sustain the plea.

2. Because the jury by twice coming in to ask if naked use for twenty years over enclosed land, would imply notice, showed that they thought the rivers an enclosure sufficient for that purpose, and had not comprehended his Honor's exposition of the rule. And plaintiff contends than an enclosure of rivers is not contemplated by the reason of the rule.

3. Because upon the facts admitted or proved, the verdict was contrary to law.

Hutson, for appellant. Matter of justification cannot be given in evidence under the general issue, in trespass *quare clausum fregit*, when the plaintiff's title is not disputed. *Riley v. Denny*, 2 Rich. 540. Defendant must therefore rely on his special plea and the evidence must be confined to the issue made, 1 Sand. Pl. & Ev. 1092. Under a plea of public highway no other way than a road in charge of commissioners or a navigable stream can be proved. Evans Dig. § 4; Wol. on W. 3; *Cotes vs. Waddington*, 1 McC. 580. Then as to the

Heyward vs. Chisolm.

merits. It is necessary that circumstances implying the owner's knowledge of the use of a way over his land should be proved in order to raise the presumption of a grant or dedication from such use. *Hutto vs. Tindall*, 6 Rich. 396; Gales & W. 87, 109. Where the way is over enclosed land the mere use is enough for the owner necessarily has notice. *Hogg vs. Gill*, 1 McM. 329; *Jeter vs. Mann*, 2 Hill, 643, and note. But an enclosure by navigable rivers on three sides of uncultivated marsh, lying five miles from the owner's settlement, can have no such effect. Gales & W. 109. The neglect of a party to obstruct or bring trespass for the use of an easement will not imply assent, when such use did him no harm, deprived him of no right, subjected him to no inconvenience, and gave him no notice. *Napier vs. Bulwinkle*, 5 Rich. 312; *Rowland vs. Wolfe*, 1 Bail. 56; *Smith vs. Kinard*, 2 Hill. 645, and note; *Hutto vs. Tindall*, 6 Rich. 396. A way over water does none of these. Trespass would not lie for passing over water without doing injury. *Norval vs. Thomson*, 2 Hill, 470; *McConico vs. Singleton*, 2 McC. 244; 1 Esp. Dig. 261; *Fripp vs. Hasel*, 1 Strob. 127.

Youmans, contra, cited Act 1853, 12 Stat. 305; 6 Mod. 255; 8 East, 4; Rep. Temp. Hard. 513; Yelv. 163; 11 East, 375; 1 McM. 43; 5 Rich. 181; 7 Rich. 392; 1 Rich. 59; 4 McC. 47; 5 Strob. 218.

The opinion of the Court was delivered by

WARDLAW, J. The defendant's plea, and the plaintiff's objections now made to it, having been considered, it appears that the material thing in the plea and the issue joined thereon, is the public right in the way described. Judge Evans in his Digest of the Road Law, page 7, thinks that our Acts of Assembly relating to roads seem to make a three-fold division

Charleston, January, 1858.

of them into highways, *private paths*, and private ways. But this attempt to systematize confused legislation cannot change the meaning of words that have acquired a settled technical signification. Highway is *nomen generalissimum*, which embraces every kind of public way, common to all citizens, whether a footway, a horseway or a cartway, or a way by water; whether under the charge of Commissioners or not, and whether originally laid out for the whole public, or laid out for particular persons and used by the public. (Jacobs' Law Dict. Highway; 6 Mod. 255.) Indictments for obstruction, of our neighborhood roads (strangely called private paths) call them highways. *State vs. Sarter*.

If the designation of the way alleged in this plea was too vague, the plaintiff should have demurred specially. (8 East, 5.) He cannot now object to the proof of one kind of highway, because in misconception he had expected an attempt to prove a different kind. There could not have been any misconception as to the allegation of a public right, nor as to the nature of this right, nor as to the subject in which it was claimed; the name by which this subject should be called is comparatively unimportant; indeed in the plea the reason is alternative and various.

The jury have found that the use of the way was adverse, and this under instructions which properly distinguished, according to our cases, between the use of a way through enclosed land, and like use through unenclosed forest. A small water passage, natural or artificial, which existed before, was in 1789, with much labor, widened and deepened by the neighbors for their own use in fishing and getting oysters. The probability is from the evidence, that it was used ever afterwards by all who desired to use it whenever they pleased, until it was lately obstructed by the plaintiff. The certainty (if Mrs. Fripp's testimony be correct) is that it was used ever after 1812, for every purpose, by all who went from her neighborhood toward Beaufort District, and sometimes by

Heyward vs. Chisolm.

people coming from the Saltketcher swamp with shingles and the like. The tide flows through it, it cuts off fifteen miles of dangerous navigation, and has been cleared out by the defendant. These circumstances liken it rather to a road made by felling timber and digging earth, than to a path through a forest, trodden into distinctness. The jury may well have found something more than the mere use itself, to indicate its adverse character: and may have properly inferred that the proprietor of the soil could not have been ignorant of the public use so long continued, and that his submission to it (more especially if his rice land was likely to suffer from salt water passing this way into Combahee river) was an acknowledgment that it was rightful.

We cannot know that the jury labored under the misapprehension which has been imputed to them. We rather conclude that they conformed to the instructions which were given to them, and under these instructions found the facts for the defendant.

The land having been bounded by deep water on only three of four sides, was not enclosed if there was no fence on the fourth side. But if by rail fence or bank, a sufficient barrier against the intrusion of animals was established on the only side where it was needed, the land was enclosed; unauthorized hunting or travelling over it would have been a trespass, (*Hasel vs. Fripp*, 1 Strob. 126) and the reason, upon which a presumption against the adverse character of the use of a road over unenclosed woodland is founded, did not apply to it.

The Court does not perceive cause sufficient to justify a disturbance of the verdict.

The motion is dismissed.

WITHERS, WHITNER and GLOVER, JJ., concurred.

Charleston, January, 1858.

MUNRO, J., dissenting. Apart from the utter insufficiency of the proof to establish a prescriptive right to the use of the cut in question as a public way, there is another ground which renders the verdict of the jury wholly indefensible. The ground is this: because from the locality of the cut, and the fugitive character of the acts claimed to establish the right, there was nothing to attract the proprietor's attention to it, or to apprise him that a right of way was claimed through his land.

In *Hutto vs. Tindall*, 4 Rich. 403, it is said "The presumption of a grant of way should be sustained by rules of evidence which may prevent its insidious operation. Too often a use commenced in courtesy, after the prescribed time is claimed adversely, and judicially established as a right. It is only a reasonable security to the land owner that he should be apprised of the adverse claim of a way over his land before the use has matured into a right, whether the way claimed is a neighborhood road or a private way. No reason can be assigned why in this respect any distinction should be made."

Apply this doctrine to the case in hand.

From the year 1788, when this ditch was first opened, to 1855, when it was obstructed by the plaintiff, there was not a tittle of proof that either the plaintiff or his ancestor were even aware of its existence, much less that it had been used by the neighborhood, and claimed as a public way.

Had the ditch been cut through a portion of his cultivated land, or even through any portion of his uncultivated high land, where it could not well have escaped his observation; his knowledge of its existence and acquiescence in its use might fairly have been presumed. But situated as it is, in a wild region of uncultivated marsh, remote from his residence, and withal so insignificant in its dimensions as not to attract observation, there was a total absence of anything upon which

Heyward vs. Chisolm.

to base a presumption, either that he knew of its existence or had acquiesced in its use.

Under circumstances like these, to permit the verdict of a jury to stand, which appropriates to the public use the property of the citizen, is at once to abandon the rights and the property of the honest land owner as a prey to the lawless rapacity of squatter sovereignty.

Motion dismissed.

Charleston, January, 1858.

R. M. M'PHERSON *vs.* NEUFFER & HENDRIX.

*Factor—Lien—Evidence—Merchants' Books—Waiver
Trover—Bill of Lading—Conversion.*

A shipped wheat and flour from Knoxville, Tennessee, to B in Charleston, South Carolina :—*Held*, upon examination of the evidence, that B was not the purchaser, but that he was the mere consignee for sale, and that the title remained in A.

The evidence further examined and B *held*, to have no lien for advances made, acceptances to mature, expenses paid, or for general balance.

An entry in a merchant's book is not evidence of a demand against his customer for forfeiture in supplying wheat according to special contract.

Where a factor, to whom goods have been consigned, refuses upon demand to deliver them, assigning reasons for the refusal and making no mention of a lien for expenses paid, such failure to mention the lien is evidence of its waiver.

A, who had shipped goods to his agent for sale, drew a bill of exchange on the agent in favor of C, and delivered to C the railroad receipts for the goods :—*Held*, that such delivery was no transfer of the title so as to enable C to maintain trover for the goods.

Where one wrongfully sells or uses the goods of another, it is itself a conversion, and demand and refusal or offer to pay charges need not be proved.

BEFORE GLOVER, J., AT CHARLESTON, JANUARY
TERM, 1857.

This was an action of trover for the conversion of four hundred and eighty-six bushels of wheat, and one hundred and fifty barrels of flour.

On the 31st July, 1855, one M. W. Williams, who was engaged at Knoxville, Tennessee, in the business of purchasing and shipping grain and flour, shipped from Knoxville two hundred and forty-three sacks, containing four hundred

M'Pherson vs. Neuffer & Hendrix.

and eighty-six bushels of wheat, consigned to the defendants at Charleston, South Carolina, and took a receipt or bill of lading for the same from the agent of the East Tennessee and Georgia Railroad Company. On the 15th August, and again on the 21st August, 1855, he shipped flour, on each occasion seventy-five barrels, from the same place to the same consignees, and took receipts for the same as before. Upon these receipts were endorsed assignments from Williams to the plaintiff, of the receipts themselves, and of the articles shipped, dated the 3d September, 1855.

Samuel Morrow, examined by commission, testified, that the signatures of Williams to the assignments endorsed on the receipts were genuine; that about the 21st August, 1855, he, the witness, advanced five hundred dollars to Williams, who placed the receipts in his possession as security; that a few days afterwards, on the 24th August, the plaintiff, to whom Williams was indebted, paid to the witness the five hundred dollars, and thereupon he returned Williams the receipts, who immediately transferred them to the plaintiff; that Williams was then considered solvent, has since become insolvent and gone to parts unknown.

Benjamin Rhett, of the firm of Rhett & Robson, testified, that the receipts were enclosed by the plaintiff in a letter to his firm; that on the 28th August, 1855, the day after they were received, he took them to defendants, and seeing Hendrix, asked if they had received the flour and requested that he would indorse the receipts. Hendrix refused to indorse and said he did not know if the flour had been received. Accompanying the receipts was a draft at sixty days for one thousand five hundred dollars, dated 21st August, 1855, drawn on defendants by Williams in favor of plaintiff. Witness presented the draft to defendants for acceptance. Hendrix took up his pen as if to accept, but did not.

Evidence as to the value of the wheat and flour, and

Charleston, January, 1858.

showing that it had been received by the defendants, was given. It further appeared that from June to September, 1855, large shipments of wheat and flour were made by Williams to defendants, the sales of which were made by them until November, 1855.

The defendants produced their account current with Williams, as follows:

M. W. Williams, in account current and interest, from July 24, 1855, to December 29, 1855, with Newfer & Hendrix.

DR.		CR.	
1855		1855	
July 24	To acceptance your draft,	Dec. 29	By nett sales Flour and
	July 20, at 60 days.....		Shorts, due Sep. 10, 1855.
	\$ 680 00		\$3,151 66
Aug. 3	To acceptance your draft,	" "	By nett sales Wheat, due
	July 10, at 60 days.....		Sep. 24, 1855,.....
	1,675 00		1,621 63
" 23	To acceptance your draft,		
	July 23, at 60 days.....		
	1,500 00		
" 26	To Cash paid forfeit on your		
	contract to Ravenel & Co.		
	through us, on 10,000		
	bushels Wheat,.....		
	1,000 00		
Dec. 29	To balance interest our		
	favor,.....		
	12		
" "	" " due you this day,		
	18 17		
	\$4,773 29		\$4,773 29
1855		1855	
Dec. 29	To Williams, Bronson & Co.	Dec. 29	By balance due you this
	for balance your account,		day,.....
	\$18 17		\$18 17
			E. E. Charleston, Dec. 29, 1855.

They also produced their account current with Ravenel & Co.

Messrs. Ravenel & Co., in account with Newfer & Hendrix.

DR.		CR.	
1855		1855	
Sep. 12	To Bill, Wheat,.....	Sep. 5	By cash received this day....
	\$7,125 35		\$2,000 00
		" 7	" " " " " " ...
			1,000 00
		" 11	" " " " " " ...
			2,600 00
		" 13	" " " " " " ...
			1,085 06
		" "	By forfeiture on Wheat,
			5,408 bushels short deliv-
			ered, as per contract.....
			540 30
	\$7,125 35		\$7,125 35

B. F. Moise, proved three drafts on defendants by Williams: one dated 10th July, 1855, for \$1,500, and payable the 11th September; one dated the 20th July, 1855, for \$680, due the 21st September, and the third dated 23d July 1855,

M'Pherson vs. Neuffer & Hendrix.

for \$1,500, and due 26th September, and all of these were paid. Williams was in the habit of shipping flour to defendants. (Witness proved two letters from Williams to defendants, one dated 3d August, and one 30th July 1855.)

Knoxville, July 30, 1855.

MESSRS. NEUFFER & HENDRIX:

GENTS:—In reply to your two last, I will say I will undertake to furnish you on the cars, by last next week, 500 bbls. Knoxville Steam Mills at 6 50 dolls. per bbl. as you propose. And as to shipments of wheat I will send you 3 to 10,000 bushels at 1 50. Your order for 30,000 bushels could be filled from below here and money made on it if you allow 15 cts. per sack, for all new two bushel Osnaburg sacks, as others have been doing in the market. Please write about the sacks.

I need no letters of credit where R. R. Receipts accompany the Drafts, and therefore return them.

I send you a car load Shorts and Middlings to see what can be done with them in your market.

Yours, &c.,

M. W. WILLIAMS.

Knoxville, Aug. 3, 1855.

MESSRS. NEUFFER & HENDRIX:

GENTS:—I wrote you a few days ago that I would take 10,000 bush. of the wheat you had an order for at 1 50. I have now five car loads in depot, and receipts for two car loads. Will have it all in, in a few days, and am willing to take 20,000 bush. more if you have not let it out. Can have the 30,000 bush. in depot by 1st Sept., and if the Rail Road can take it forward as fast as delivered you should get it all by 10th Sept. Wheat this year is very good and if you desire it, can send you samples by express. Please write me about the sacks. Will heavy domestic sacks do? They

Charleston, January, 1858.

can be bought at 10 or 12 cts. Osnaburgs will cost 15 and our town is now out of the Osnaburgs. Have four car loads flour ready.

Yours, &c.,

M. W. WILLIAMS.

Of the 243 sacks in July, can't say how many were received 145 were received and sold the 12th and 20th September. A week or ten days is the time of transportation between Knoxville and Charleston. All the flour shipped by Williams was sold. The bulk by the 5th September—some before—and most before the 3d. The transactions with Williams in wheat are in one lot \$1,621 63, and in flour and shorts \$3,151 66. From July 12th to 29th August, or 1st, 2d or 3d September, were the dates of the receipts in Knoxville, and the sales at different times until 6th November, when some few sacks of damaged wheat were sold. 10th Sept. 1855, \$3,151 66, is nett proceeds to Williams' credit, and 24th Sept. 1855, \$1,621 63, is amount to Williams' credit from sales of flour and wheat. The flour was sold from \$6 50 to \$9 per barrel. \$6 50 is price agreed upon by Williams and defendants as per letter of 30th July, 1855. Defendants could not fill their contracts made with persons here for flour. Defendants received only 300 barrels during the contract. He don't know if the first 150 barrels, shipped 12th July. were on this contract. He commenced with defendants as clerk, in June, 1855. From defendants' ledger, \$18 17 appear to be in favor of Williams, and this was carried to the credit of Brunson & Co., (of which Williams was a member,) and which firm is indebted still to the defendants in the sum of \$10,646 34. Defendants charged Williams with a forfeit, as Williams did not complete his contract, and it is entered as cash in the book against Williams. There was a contract between defendants and Ravenel for wheat and a forfeiture was paid by defendants.

M'Pherson vs. Neuffer & Hendrix.

He can't say how much, nor can he say that the \$1,000 was paid or to whom.

His Honor the presiding Judge, in his report, says:

"The important enquiry was, were the wheat and flour shipped and consigned to defendants pursuant to their order and had they a beneficial interest. Having called the attention of the jury to the rights and liabilities of consignor and consignee, they were directed to enquire, if the consignment was made according to the order of defendants, under a contract to purchase, and if they so found, the verdict should be for the defendants. They were instructed, that if goods were shipped pursuant to order, the consignor is no longer the owner and cannot change the consignment: that if this wheat and flour were part which Williams had contracted to sell to defendants, he could not, after the shipment, make a valid transfer of it to Morrow or plaintiff, by the endorsement of the bills of lading.

"In directing the attention of the jury to the account current between the defendants and Williams, I alluded to the forfeiture of \$1,000, an item debited to Williams in the account, and asked where was the evidence to prove it. In this connection I referred to the character of forfeitures like the one alleged to have been incurred in this case, and compared them to those colorable contracts for the sale and purchase of articles where neither party intended to deliver or accept, but only to pay differences according to the state of the market; and added, that such were held to be gaming contracts, in England, under a late Statute of Parliament.

"The jury found for the plaintiff a verdict of \$1,737."

The defendants appealed, and now moved this Court for a new trial on the grounds:

1. That his Honor erred in charging the jury that they

Charleston, January, 1858.

should find for the plaintiff unless there had been a sale to the defendants. Whereas it is submitted that if the shipment was without order, then the consignor could not alter the bill of lading after delivery to the consignees, the defendants; and if pursuant to orders then the consignor was "*functus officio*" and could not alter the bills of lading unless the consignees were insolvent.

2. That the only evidence of the nature of the shipments was the letters of 30th July and the 3d of August, between M. W. Williams and Neuffer & Hendrix, his factors and agents, which clearly showed a shipment pursuant to orders and at a fixed price.

3. That if the shipment was without orders then the verdict was manifestly wrong, as the proof was that all the flour and wheat received by the defendants, except that of the seventy-five barrels of flour of the 21st of August, had been long before delivered to the defendants and the whole by the 3d of September, 1855.

4. That his Honor should have charged the jury that no property in these goods could have passed to the plaintiff under any circumstances until the 3d September, 1855, the date of the transfer.

5. That his Honor erred in charging the jury that if there was no sale, then the defendants were bound to account to the plaintiff in an action of trover for the proceeds, whereas it is submitted there could be no recovery if there had been a delivery to the defendants before the transfer of the bill of lading, or if the shipment was pursuant to orders, or if the defendants were creditors.

6. That his Honor erred in charging that there was no

M'Pherson & Nouffer & Hendrix.

proof of any forfeit so as to charge Williams, Williams' letters being silent as to any forfeit to be paid by him : as the forfeit of one thousand dollars was paid by the defendants as his agents, and so proved.

7. That his Honor erred in charging the jury that a penalty to be paid as a forfeit for the non-delivery of goods was void as a wager.

8. That his Honor erred in charging the jury that under the circumstances the defendants were bound either to accept the draft or refuse the consignment, whereas there is no proof of the presentation of the draft to defendants.

9. That the plaintiff could not recover on the duplicate of the bill of lading of 31st July, there being no competent proof of the loss of the original.

10. That the verdict was capricious and excessive, the only proof of the quality of the flour and wheat being that offered by the defendants, some of which was damaged, and that the jury should not have found more than the proceeds of the same realized by the defendants, and that the jury should have allowed the defendants the freight, drayage and customary expenses of the same.

Simons, Memminger, for appellants.

Porter, contra.

The opinion of the Court was delivered by

WITHERS, J. The leading question on the trial of this case, that indeed upon which the defendants staked the fate of their defence, was whether the four hundred and eighty-six bushels

Charleston, January, 1858.

of wheat and the one hundred and fifty barrels of flour, the subject-matter of contest, were consigned to them by one Williams upon an order for purchase; or whether these articles were sent to them as factors or consignees merely, and therefore subject to the order of the shipper. This question the jury determined against the defendants; and, in the opinion of this Court, there was abundant evidence to support such finding. In the first place, Williams drew a bill of exchange against the goods in favor of McPherson and accompanied the same by the carrier's receipts placed in his hands but not otherwise transferred. The same receipts had been in the hands of one Morrow for a few days and were redeemed by McPherson, who reimbursed Morrow for his advancement to Williams, whereby the indebtedness of the latter to McPherson was increased. This disposition of the carrier's receipts, accompanied by a draft, is not reconcilable to the idea that Neuffer & Hendrix were the owners of the wheat and flour; for it must have been intended from the very nature of the transaction, and the evidence is explicit that it was in fact intended, to give Morrow first and McPherson last some sort of control over the articles shipped, or over the specific proceeds of them, to secure the reimbursement of money advanced. In the second place—The account current with Williams, produced by Neuffer & Hendrix, which (they say) embraces the goods that are the subject of this action, debits the defendants with the *nett* proceeds of those goods which is wholly inconsistent with the pretension that they were purchased in pursuance of a contract for the same at stipulated prices. In the third place—In the letter of the 30th July from Williams to the defendants, wherein he says he will furnish five hundred barrels of flour at six dollars and fifty cents per barrel, and from three to ten thousand bushels of wheat at one dollar and fifty cents per bushel, he also says, as follows: "I need no letters of credit where railroad receipts accompany the drafts and therefore return them." It is clear from this,

M'Pherson vs. Neuffer & Hendrix.

that Williams meant to pledge the articles shipped by the use of the carrier's receipts, and not to rely upon bills drawn on his vendees in Charleston, nor to place the payees of those bills upon the credit of him and his consignees merely. He could not so pledge goods that had become another's by sale and delivery. He meant to occupy such position as would preserve the right of stoppage *in transitu*. Lastly—When Rhett, in behalf of the plaintiff, called upon the defendants for an acceptance of the draft, or a renunciation of the consignment by an indorsement of the carrier's receipts, whereby he would have been entitled to demand and receive the goods from the carrier, the claim of title to them by purchase, or the right to hold them on any other ground, was not pretended. We, therefore, consider the jury well warranted in affirming that Neuffer & Hendrix were not purchasers, in any sense.

Then, in the argument here, the defendants' resort to the rights of consignee or factor, and assert a claim to retain for liens, to wit, for expenses, for balance on account, and liabilities for acceptances. This right, they allege, existed when a demand was made by Rhett, on the 28th August, 1855, and no reimbursement or release from liability was then, or afterwards made or tendered.

There is no occasion to discuss the fruitful topic of law as to such rights of factor or consignee, being creditor of the shipper upon advances made, expenses paid, or acceptances yet to mature. The general principle is clear enough in favor of such right to retain in such circumstances. But the question arises, was there in point of fact any lien on these goods?

As to advances made or liabilities upon acceptances; there is no evidence of either, (unless it can be discovered in the account current,) on the 28th August, 1855, or at any other time, touching the specific wheat and flour in question. The wheat was not delivered to the railroad in Tennessee earlier

Charleston, January, 1858.

certainly than the 31st July, 1855, and the flour not earlier than the 15th and 21st August, of the same year. Now the acceptances charged in the account with Williams are all before either of the above dates: they are of July 23d, July 24th, and August 3d, 1855, and make an aggregate of three thousand seven hundred and fifty-five dollars. When we observe, as the report states, that "from June to September large shipments of wheat and flour were made by Williams to the defendants, the sales of which were made by them 'till November,"—that Williams' plan of business, as set forth in his letter of July 30th, and illustrated by what he actually did with McPherson, was to draw a bill against his shipments and supply the payee of the same with the carrier's receipts—that there is no evidence and if the truth were otherwise the defendants would have shown it, that Williams drew any bill against the wheat and flour in question, except that delivered to McPherson and refused acceptance by the defendants, it cannot be believed or plausibly affirmed, that on the 28th August, 1855, they were under acceptance for Williams on account of these particular parcels of wheat and flour, or either of them. Such matters as are entered in their account, under two lumping items, under the general date of December 29th, sold nobody knows when or when received, may or may not embrace the parcels now sued for, but the aggregate nett proceeds make the defendants debtors, not creditors. So the right to enforce any specific liens on the specific wheat and flour is not established, but rather disproved.

As to their right to retain for general balance on account against Williams—Where is the evidence that he owed them any general balance, at any particular time? If the truth was so, could not the defendants have shown it? What they do show, however, is this; under date 29th December, 1855, they credit Williams with three thousand one hundred and fifty-one dollars and sixty-six cents, nett sales of flour and shorts, due September 10th preceding, and with one thous-

M'Pherson vs. Neuffer & Hendrix.

and six hundred and twenty-one dollars and sixty-three cents for nett sales of wheat, due September 24th preceding, amounting in the aggregate to four thousand seven hundred and seventy three dollars and twenty-nine cents. Deduct for acceptances charged by the defendants, and hereinbefore stated, three thousand seven hundred and fifty-five dollars, and the balance was in favor of Williams for one thousand and eighteen dollars and twenty-nine cents. Nor is this balance to be reduced by the item of one thousand dollars entered as for forfeiture paid to Ravenel & Co. Neither the payment of this item nor the authority and duty to pay it, on account of Williams, is proved. A book entry will not maintain such demand. Whether such sum was ever paid, or to whom, the defendants' witness did not know. He said defendants paid to Ravenel & Co. a forfeiture upon default in supplying wheat according to their contract. In their account with that firm, however, we find charged on that score, under date 13th September, 1855, five hundred and forty dollars and thirty cents, forfeiture on five thousand four hundred and three bushels of wheat, short delivery. The rate of forfeiture was therefore ten cents per bushel. What had Williams to do with this? The forfeiture charged to him as paid to Ravenel & Co., is represented to have accrued on a contract with them by Williams through the defendants, is set down at one thousand dollars, and under date 25th August, 1855. It is urged that this arose from Williams' default to forward ten thousand bushels of wheat according to his contract, as shown by his letters, copies of which appear in the brief. There is not a particle of proof of such a contract between Williams and Ravenel & Co., and this item of forfeiture becomes too suspicious to warrant any complaint against a jury who should reject it, when the conflict of dates and sums above noticed is taken into consideration. In one account a forfeiture for five hundred and forty dollars and thirty cents, is entered on 13th September;

Charleston, January, 1858.

in the other the forfeiture is entered for one thousand dollars as of 25th August. Conjectures are submitted to account for these discrepancies, but where a man is called upon to pay one thousand dollars on such a score as this, nothing less than explicit, intelligible and reliable proof will do. The lack of such evidence, on the part of those who make such demand, and the production of such evidence as we have here, combine to explode the item for forfeiture. Then, we conclude, there is no evidence that on the 28th August, when the plaintiff demanded an acceptance of his draft for one thousand five hundred dollars, or a transfer of the wheat and flour, or what is tantamount, a relinquishment to him of a right to receive them, the defendants had any general balance against Williams on factorage account.

As to their lien at that time for expenses or commissions, or both—Whether the wheat had been then received, or if so, whether it had been sold, is left in uncertainty. Hendrix said, he did not know whether the flour had been received and he said no more. No claim so far as the evidence goes, was then made to retain on any account whatever. How could payment be made of such a claim, or tender of it required, when such right was unclaimed and unknown? If a party have a lien and does not mention it as a ground of refusal, but refuses upon other grounds, it is evidence of his having waived the lien; *Duke vs. Richards* and note, 41 Eng. Com. L. R. 340.

Thus far the result is, that in the four hundred and eighty-six bushels of the wheat, and one hundred and fifty barrels of flour, the defendants had no right of property, absolute or qualified, and ought to have rendered them to the rightful owner on the 28th August, 1855.

We are thus brought to the question, had McPherson then the right of property in the wheat and flour: if he had not there was at that time no conversion as against him.

Whatever equitable interest or lien he may have had by

M'Pherson vs. Neuffer & Hendrix.

the possession of the carrier's receipts and the advancement of money to the shipper upon his bill drawn against the goods, he had not on the 28th August such legal title to them as would have then maintained an action of trover. This seems very plain when we observe, that on the 21st August, Williams being then the unquestionable owner of the goods, drew a bill against them upon the consignees for one thousand five hundred dollars and delivered that, with the carrier's receipts, to the payee, the plaintiff. What then was expected and necessarily imported by such transaction? Undoubtedly that Neuffer & Hendrix would accept the bill and sell the goods to pay it. If the goods themselves were sold the receipts might as well have been then indorsed as on the 3d September afterwards. While goods are *in transitu* it is often very difficult to say, as whose agent the carrier holds them, when a transfer of some right of property in them, or some kind of possession of them, actual or constructive, is meant to be transferred by the original bailor to a third person: and this presents the arena of vast litigation. Every such case must rest as well upon intention as upon acts done. We think the facts show that Williams never parted with the legal right to the goods, the right of stoppage *in transitu*, either to Morrow or to McPherson, and that he never so intended until the 3d September, when he assigned the receipts. Then it was that McPherson acquired such legal interest as would maintain trover, against a wrong doer. He did not before acquire it, else the bill of exchange to be accepted, and paid by the defendants out of the sales of the goods, would never have been drawn. This consideration overthrows the idea that the mere delivery of the carrier's receipts not indorsed or assigned, was a symbolical delivery of the goods themselves, as in the case of the key of a warehouse, or the transfer of a bill of lading within the law commercial. In the case of *Wilkes et al. vs. Ferris*, 5 Johns. 336, cited for the plaintiff, the sugar there in question had itself been assigned, and the

Charleston, January, 1858.

warehouseman's receipt delivered by the assignor, and this makes an obvious distinction between that case and this. The defendants were expected to accept the bill of exchange. and it could not have been designed that they should, when the receipts unassigned were delivered, part with the goods. This seems to have been understood by McPherson and Williams, for measures were at once taken to procure assignments of the receipts. It is not perceived how McPherson could have compelled a delivery of the wheat and flour to him, by the railroad or other person, before he acquired the right so to do on the 3d September, 1855.

Nevertheless we think that McPherson's action was well founded when he did institute it. What occurred on the 28th August, though no conversion as against him, was full notice to the defendants of his claim and of a revocation of their authority to receive the goods or to dispose of them, proceeding from Williams who was the owner confessedly.

The plaintiff brought his action in October, he acquired his legal right on the 3d September, meantime, or at some uncertain time which the defendants chose to leave uncertain, they sold the goods, and certainly that act was a conversion itself. If a party wrongfully assume property in goods belonging to another, or wrongfully use them, it amounts to a direct conversion, and in general no demand or refusal is necessary before bringing an action, nor is it necessary to offer to pay any charges. 6 East, 540. Brown on Actions at Law, 437, and the authorities cited in note. It was indeed contended that the wheat was received and perhaps sold before the 28th August, and before McPherson's title was perfected. If this be true, (and the defendants having it in their power failed to prove it,) what more natural, what more incumbent on them, than to have said so to Rhett, and to have placed their refusal to accept the draft, or to transfer or deliver the goods, on such grounds? Yet the defendants did not, and in the account current produced by them they do not,

M'Pherson vs. Neuffer and Hendrix.

disclose the time of sale, nor identify one parcel of wheat or flour as distinguished from another, nor adduce any evidence on these points. If they thus withhold what it must be presumed was in their power to disclose, they cannot justly complain that adverse inferences have been drawn from imperfect and dubious disclosures, some of which, as the item of forfeiture for example, excites distrust.

We have not in this discussion been guided by the order observed in the series of grounds of appeal, nor have we altogether restrained our investigation to limits plainly prescribed by them. The grounds of appeal taken ought to limit the discussion in this Court. It was desirable however to give them in the present instance, a liberal scope, rather than incur the hazard of too narrow a view of the real merits of this cause. The observations already made comprise a consideration of the meritorious questions which the evidence makes, and grounds of appeal taken could make no more. If certain questions were not made upon the circuit, or little attended to there, that are stirred here, or if a better foundation could have been laid there for the defendants, in certain respects, by the production of more testimony than they did adduce, and they have suffered from obscurities thence arising, the consequences must justly rest upon themselves.

The motion is dismissed.

WARDLAW, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Charleston, January, 1858.

NEIGHBOR WINDHAM vs. G. W. RHAME.

Damages—Case—Public Nuisance.

In an action on the case for obstructing a public way, vindictive or punitive damages, beyond the amount of the plaintiff's actual loss, may be given.

BEFORE WARDLAW, J., AT CHARLESTON, MAY TERM,
1857.

The report of his Honor, the presiding Judge, is as follows:

“Action on the case for special damage done to the plaintiff, by the defendant's obstruction of the way from a public road to a public landing on Wadboo river.

“The public right to the landing, and to the way from the road to the landing, was shown by evidence of long continued use by everybody that pleased, and of repeated acknowledgments by various proprietors of the land which includes and surrounds the landing and way. The defendant acquired this land by purchase, in 1853, and there was evidence of his declarations and of circumstances, which went to show that he knew well, and had assented to, this public right in land covered by the conveyance to him.

“The plaintiff's land extended from three-quarters of a mile to one and a half miles from the landing, and he was used to cut wood on his land, and to ship it to market from this landing. In 1855 he hauled to an old field, the point of his land nearest to the landing, fifty cords; he hauled two loads to the landing; when he came with the third load, he found that the defendant had obstructed the way between the public road and the landing, and forbade his passing.

Windham vs. Rhame.

He threw this load by the road side. The two loads which he had deposited on the landing, the defendant took and sold, saying that they were his, as he had forbid plaintiff from hauling to the landing. The remainder of the fifty cords lay useless in the old field, and is now much deteriorated. It was never worth more than one hundred and fifty dollars at the landing.

"I held that the peculiar damage which the plaintiff has sustained in the loss of his wood, over and above the damage which all the community had suffered from a public nuisance, would sustain his private action :

"That in estimating damages, so far as reparation was intended, the jury was bound to confine itself to the actual loss, and could not consider profits prevented or other such speculative loss.

"But that in actions on the case, punitive damages might be found in the sound discretion of the jury, if evil motive or unworthy conduct, deserving punishment, had been established against the defendant. I submitted the motive, and conduct of this defendant to the consideration of the jury.

"The verdict was for plaintiff five hundred dollars."

The defendant appealed and now renewed in this Court, his motion for non-suit, on the ground, that the damage proved in this case was not of the character which will sustain a private action.

And failing in that motion then he moved for a new trial, upon the grounds:

1. That his Honor charged that the jury had the power to find a verdict for vindictive or punitive damages, whereas, it is respectfully submitted, that in private actions for damages by a public nuisance, the verdict must be limited to the *actual* damage.

Charleston, January, 1858.

2. Because, even if the law in such case, permitted a verdict for vindictive damages, there was no proof of malice or evil motive or other matter, to warrant the verdict in this case.

Pressley, for appellant, cited *McDowell vs. Murdock*, 1 N. & McC. 237; *Duncan vs. Markley*, Harp. 276; *Wilkes vs. Hungerford & Co.*, 29 Eng. C. L. R. 281; *Myers vs. Malcolm*, 6 Hill, 294; *Stallings vs. Corbett*, 2 Sp. 612; 4 Denio, 461.

Hayne, contra, cited Sedgw. on Dam. 35, 38, 551; 2 Wils. 205; *State vs. Pettus*, 7 Rich. 390.

The opinion of the Court was delivered by

GLOVER, J. The special injury alleged by the plaintiff, consists of the loss and deterioration in value of several cords of wood, caused by the defendant's unlawful act in obstructing a public road. It is conceded, that whoever sustains a particular injury from a public wrong, beyond that suffered by the rest of the community, may maintain an action—consequently the motion for a non-suit was abandoned at the hearing, and the argument was confined to the motion for a new trial, on the ground of error in the charge. The jury were instructed, "that in actions on the case, punitive damages might be found in the sound discretion of the jury, if evil motive or unworthy conduct, deserving punishment, had been established against the defendant."

The form of action furnishes no certain rule by which damages may be measured. In actions of contract the motive of the defendant is not generally an element which enters into the estimate of damages, but in actions of tort, a large discretion is allowed to the jury if the act be wilful or the intent malicious. The general rule adopted in injuries to person, character or property, whether the action be trespass or case, is that all the attending circumstances, showing a

Windham vs. Rhame.

malicious motive, may be given in evidence, and damages may be awarded not only to recompense the plaintiff but to punish the defendant. In actions on the case where the act complained of was the result of negligence, exemplary damages are allowed;—as where injury arose from the defect of a bridge which the defendants were bound to repair, (*Whipple vs. Walpole*, 10 N. H. R. 130.) If personal property is maliciously injured or destroyed, in an action of trespass, the extent of relief is not limited to the actual loss, and in one case for beating a horse to death, where smart money was given, the Court said, "We should have been better satisfied with the verdict if the amount of the damages had been greater and more exemplary." (*Woert vs. Jenkins*, 3 Johns. 56.)

Whether the relief is sought in trespass or case, for injury to personal property, all the surrounding circumstances that give color to the act and explain the motive, are admissible in evidence to ascertain if the act be the result of accident or negligence, or of deliberate and evil purpose, and, if from malfeasance, an amount beyond the pecuniary loss should be given, by way of punishment. In cases of tort to the person or character, damages must depend in a great measure upon the motive and degree of aggravation, and "the verdict is generally a resultant of the opposing forces of the counsel on either side, tempered by such moderating remarks as the judge may think the occasion requires." (Mayne on Law of Dam. 12.)

The injury to the plaintiff's property was caused by the deliberate act of the defendant in obstructing a public way, and by the conversion, subsequently, to his own use of so much of the wood as he had enclosed by his fence on the public landing. From the attendant circumstances his wanton conduct may be reasonably inferred—and if the plaintiff had endeavored either to re-possess himself of his property, or to assert his right to the use of the way by abating the nuisance, otherwise than by due course of law, the conse-

Charleston, January, 1858.

quences probably would have been a breach of the peace. Had the defendant acted on a mistaken opinion of his right to the land, it would have weakened the presumption of a malicious purpose; but he both knew and had assented to the public right.

Where a nuisance is not abated, after one verdict, the jury may give punitive damages in a second action brought for the continuance of the nuisance, upon the ground, that from his failure to abate it, after verdict, it is presumed that the defendant's original act was wilful, and from which an intention to continue the nuisance is inferred. If from the circumstances that give character to his act, his motive can be ascertained, in the first action, the plaintiff is entitled to such enhanced damages as will afford complete redress by a prompt abatement of the nuisance.

The plaintiff has set out his special damage, and we are of opinion that the evidence was properly admitted to show the defendant's motive, and that the jury was not limited to the actual pecuniary loss. There was evidence from which the defendant's wanton purpose may be inferred, and the amount of the verdict does not appear to exceed the bounds of wholesome example.

The authority of *Hamilton vs. Feemster* may be relied upon in support of this opinion, (4 Rich. 78.) That was an action on the case, and the charge was "that if the evidence satisfied the jury that Feemster had taken up and caused to be committed to jail, as a runaway, the plaintiff's negro, knowing he was not a runaway, and had done this act malevolently with a view to harass, vex and insult the plaintiff, they might give an amount of damages beyond that specially set forth in the declaration." The damages were punitive and the charge was approved.

Motion dismissed.

WARDLAW, WHITNER and MUNRO, JJ., concurred.

Motion dismissed.

Gourdin vs. West and Robertson.

R. N. GOURDIN vs. PRESTON WEST AND ALEXANDER
ROBERTSON, EXECUTORS.

Salvage—Master and Slave.

Where salvage is awarded to a slave as one of the crew of a saving vessel, it belongs not to the owner of the slave if he be hired out, but to the party to whom the slave was at the time hired.

BEFORE GLOVER, J., AT CHARLESTON, FALL TERM, 1857,

The report of his Honor, the presiding Judge, is as follows:

“The plaintiff sued in the summary process jurisdiction, and the case was this: John Magee, the testator, in his lifetime, hired a slave named John, of plaintiff, to work on board of the steamer General Clinch, which vessel he commanded. During the continuance of the contract of hiring, the steamer fell in with and saved a wreck. The claim for salvage was referred to a Committee of the Chamber of Commerce, who awarded a certain amount to the owners, officers and crew of the steamer. Persons acting as average adjusters afterwards apportioned this amount among the officers and crew according to the established usage. Capt. Magee died a few days before the award was made, and the defendants, his executors, represented the whole slave crew, including John, who was employed as steward, giving consent for them and binding them to abide the award of the Chamber of Commerce, and they received the amount awarded to the slave crew. The plaintiff took no part in the reference to the Chamber of Commerce. In the apportionment made among the crew the sum of seventy-three dollars and sixty-three cents was allowed to the steward, (John.)

Charleston, January, 1858.

"Three steamers were engaged in saving the wreck, and the average adjusters were employed by the agents of Capt. Magee to ascertain what portion of the gross amount, which had been awarded by the Chamber of Commerce, each steamer was entitled to.

"It was admitted that it is the usual practice for steamers to go to the aid of vessels ashore, and that the plaintiff has been for years and still is a merchant, and doing such business as brings him into contact with vessels.

"The plaintiff, as owner of John, sues to recover seventy-three dollars and sixty-three cents, the amount allowed to the steward by the average adjusters, and which had been paid to the defendants, executors of Capt. Magee.

"As the service was performed by John during the contract of hiring and while he was under the control of Capt. Magee, who was entitled to the fruits of his labor, I was of opinion that the payment to his executors was proper, and, therefore, decreed for the defendants."

The plaintiff appealed upon the grounds:

1. That salvage being one of the civil rights which would belong to a slave, if a freeman, and not to his hirer, is vested in his owner and not in his hirer.

2. That the hirer of a slave, even if owner for the term, is entitled to nothing but what such slave acquires as a *quantum meruit pro opere et labore*; and that salvage is not such.

Young, for appellant. Whatever a hired slave earns as salvage, belongs to his owner and not to his hirer; because (I.) salvage is not a *quantum meruit pro opere et labore*, and because (II.) the hirer is entitled only to what a hired slave earns as such, and because (III.) salvage is a civil right which the slave, if a free servant, and not his master, would enjoy

Gourdin vs. West and Robertson.

and appertains consequently to his owner—the representative of his personality.

I. Salvage is not a *quantum meruit*, &c. Conkling Ad. Jur., &c., 278 ff. Abbott, Shipping (side page,) 554. It is not the subject of contract. Conkling, loco citato, 279–280; The Schooner *Emulous*, 1 Sum. 210.

Rooles d'Oleron, Art. 4,	} Pardessus, Collection de Lois Maritimes, vol. 1, p. 326, and vol. 2, pp. 308, 394.
Le Consulat de la Mer., ch. 132,	
Guidon de la Mer., Art. 31,	

And, when earned by an apprentice—the almost temporary slave of his master (Hargrave's note to Coke on Litt. 117 a.)—belongs to him and not his master. The *Columbine*, 2 W. Rob. 186–187; The *Two Friends*, 2 W. Rob. 353; *Bell vs. The Ann*, 2 Peters Ad. 282; The *Blaireau*, 2 Cranch, 270; The *Caroline*, 7 Jurist, 660. It is owing to its character of being no *quantum meruit*, but only a reward for services *gratuitously* offered, that passengers, &c., no matter how efficient their services, are generally entitled to no salvage. Conkling, l. c. 274–277.

It is awarded for services, which, if performed on land, would be entitled to no compensation. The *Blaireau*, 2 Cranch, 266.

If a salvor, entitled to ever so large a salvage, embezzles any part of the property salvaged, he forfeits all claim. The *Blaireau*, l. c. 266; Conkling, l. c. 295; Abbott, l. c. 560, note 1.

It has been expressly so decided. *Rowe vs. The Brig*, 1 Mason, 375; The *Blaireau*, 2 Cranch, 266; *Bearse vs. Two hundred and forty pigs of copper*, 1 Story, 325; The *Schooner Emulous*, 1 Sum. 210; The *Henry Ewbank*, 1 Sum. 413. The hirer is entitled only to what the slave hired to him acquires as a *quantum meruit pro opere et labore*, in the service for which he is hired. Smith, Master & Servant, (Law Lib. 65) 80; Story, Bailments, §§ 395, 394, 383–385; Kent, Commentaries, 2 v. 586.

And the opinion, that the hirer of a slave is his owner

Charleston, January, 1858.

pro tem. is not supported by our decisions. *Colcock vs. Goode & Rose*, 3 McC. 516; *Wells vs. Kinnerly*, 4 McC. 123, 124; *Antonio vs. Clissey*, 3 Rich. 204; *Perry vs. Dunlap*, 1 Hill, 401; *Corley vs. Cleckley*, Dud. 85; *Tennent vs. Dendy*, Dud. 85; *Wilder vs. Richardson*, Dud. 323; *White vs. Arnold*, 6 Rich. 138; *Stinton vs. Wren*, 2 Rice Dig. 94. But is refuted by the general doctrine of bailments. Story and Kent, as above; *Spencer vs. Pilcher*, 8 Leigh. 582. And by our own cases. *Helton vs. Caston*, 2 Bail. 95; *White vs. Chambers*, 2 Bay, 70; *Carsten vs. Murray*, Harp., 113; *Tennent vs. Dendy*, Dud. 88; *Bacot vs. Parnell*, 2 Bail., 424; *Corley vs. Cleckley*, Dud. 35. Compare Roman Law on this subject. Tit. 2, ch. 9, § 4, Institutes; Tit. 41, ch. 1, fr. 10, § 3, Digests; and Tit. 3, ch. 18, § 1, Institutes.

III. From the nature of slavery, "a slave has no rights which are not merged in or do not flow from the rights of his owner," and, therefore, all the rights, which a slave, if a freeman, would enjoy, are vested in his owner; consequently the owner of a letten slave retains to himself, in opposition to the hirer, all the rights which a free servant retains to himself in opposition to his master. (See cases already cited.)

Compare Tit. 4, ch. 4, principium of the Institutes.

And because salvage is a civil right, which the slave, if a freeman, would enjoy, and not his master.

As in cases of seamen. Conkling, l. c. 274. And of apprentices. *Tennent vs. Dendy*, to show analogy between apprentices and letten slaves, and then cases already cited in regard to apprentices.

And the owners of vessels, when they receive salvage, receive it not on account of the services rendered by their servants, (seamen,) but on account of the risk run by their vessels. Conkling, l. c. 292.

IV. Our view of this case supported by *Small vs. The Messenger*, 2 Peters, 286; *The Blaireau*, 2 Cranch, 240; Conckling, l. c. 277; Flander, Maritime Law, 349.

Gourdin vs. West and Robertson.

V. On the principle: "*cujus est periculum ejus esse debet commodum*," owner should have the salvage earned by his letten slave, and not the hirer; for if the slave had perished in wrecking, his loss would have fallen on his owner, and not on his hirer.

Because wrecking not being necessarily attended with loss of life, the death of a slave engaged in it would be presumed to be caused by his own negligence. *Clark vs. McDonald*, 4 McC. 223; *Felder vs. The R. R. Co.*, 2 McMul. 403.

And at most, bailee is liable for loss only, "if there had been an omission of reasonable diligence," which omission must be proved by the bailor. Story, Bailments, §§ 408, 398, 399, 406, 410. *Swigert vs. Graham*, 7 B. Mon. 662: *Beverly vs. Brooks*, Wheat. 100. And, furthermore, whoever hires a slave for a particular calling, warrants his fitness to perform all its duties, and can claim nothing from the bailee if he is lost when engaged in their performance. Story, Bailments, § 390 a; *Heathcote vs. Pennington*, 11 Iredell, 643.

Consequently, as wrecking is one of the duties of the seaman, plaintiff must have borne the loss of his slave, had he perished when wrecking.

And, lastly, as plaintiff knew that it was "the usual practice" for steamers to go wrecking, and did not object, he would be concluded from claiming any compensation for the loss of his slave. *McLaughlin vs. Lomas*, 3 Strob. 85.

Mitchell, contra,

The opinion of the Court was delivered by

GLOVER, J. To a want of jurisdiction suggested in the argument, it may be answered that no such objection was taken in the pleadings or in the Court below. (*Varney vs. Vosch*, 3 Hill, 239.) But if the objection be properly before us the reply would be conclusive, that the case does not involve any question

Charleston, January, 1858.

respecting the allowance and apportionment of salvage, and, exclusively within the admiralty jurisdiction. The amount of salvage and the average apportionment have already been settled by the Chamber of Commerce at the instance of the defendants' testator, and since his death, the sum awarded to John, as steward, has been paid to the defendants. If, therefore, they have received money to which they are not legally entitled and which *ex equo et bono* belongs to the plaintiff, an action for money had and received will lie to recover it back, and this is the plaintiff's action. Because it may become necessary in the adjudication of a case in this Court to consider or apply principles of law which have been settled by other tribunals, it does not follow that the latter alone have cognizance of the case. In actions on contracts of marine insurance, an objection to the jurisdiction of this court could not be maintained, because in settling questions of sea-worthiness arising in such actions, we look for aid to the decisions of Courts of Admiralty, claiming a concurrent jurisdiction. If, therefore, the want of jurisdiction had been brought to the notice of the Court, we do not perceive that the objection could have availed the defendants.

The motion to reverse the decree rendered by the Circuit Court raises the question, whether salvage awarded to a slave while under a contract for hire, belongs to the owner or the hirer.

During the continuance of such contracts, the hirer is clothed with the authority of the owner. He alone directs the labor of the slave, enforces obedience by proper discipline, and is exclusively entitled to the profits derived from his services. His rights to this extent are established by the cases cited in support of the appeal, and it must be acknowledged that, without a distinct recognition of them, all the strong inducements which operate in the making of contracts for the hire of slaves would be wanting. By the appellant's argument the general rule is admitted, that what a slave earns

Gourdin vs. West and Robertson.

in the performance of those services which the hirer may lawfully require, under the terms of his contract, belongs to him; but cases involving the compensation awarded to salvors furnish, it is said, an exception.

Salvage service consists, not only of labor rendered voluntarily, but of the skill displayed and of the risk incurred by those who undertake it—and as an inducement to meet promptly, the hazards of such a service, the courts, acting upon principles of public policy, are prodigal in the compensation they bestow. A crew shipped to perform the duties usually required of mariners and apprentices in the navigation and preservation of the ship, are under no obligation imposed by their respective articles to incur the toils and dangers incident to wrecking, and such service is, therefore, said to be gratuitous and extraordinary, and the salvor is defined by Lord Stowell to be, “a voluntary adventurer.” (*The Neptune*, 1 Hagg, 227.) If a seaman or apprentice should refuse to perform the service, obedience, could not be enforced either under the shipping articles, or articles of apprenticeship. But is the service of a slave either voluntarily or extraordinary, and can he be called a voluntary adventurer who discharges duties exacted by an express contract, and the performance of which may be commanded under the penalty of disobedience? Will a hired slave be influenced to incur great personal danger, which is one of the elements of salvage service, by the temptation of a reward which he cannot hope to enjoy? Other distinctions may be found between agreements for the hire of slaves and shipping articles, and articles of apprenticeship. Salvage service is incident to the former but not to the latter;—is an ordinary service in the one case, and an extraordinary one in the other; is bestowed gratuitously by the mariner and apprentice, and is exacted from the hired slave by the command of his qualified owner.

Although contracts for salvage are not generally obligatory upon the owners of property saved; yet a contract made by

Charleston, January, 1858.

the master of a ship with the mariners to perform all the duties that pertain to the business of wrecking, in consideration of stipulated wages, might be enforced, and would require service neither voluntary nor extraordinary; because to such employment salvage service would be incident; and in what respect does the plaintiff's agreement with Capt. Magee differ from such a contract. When vessels were seen in imminent hazard, the General Clinch and her crew were usually employed to render assistance, which was known to the plaintiff when he hired John, and consequently, he was advertised that this was in the course of the ordinary business for which his services were required. Unless it be conceded that the hiring was in reference to such service, (and on this admission the appellant's argument rests,) the risk attending it would be assumed by the hirer, and consequently he would be entitled to salvage, which is the consideration awarded for the labor, risk and skill—*cujus est periculum, ejus esse debet commodum*.

John was one of the agents employed by Captain Magee, subject to his orders and compelled by contract to yield obedience in discharging a duty required in the ordinary course of his business;—and although, when the apportionment of salvage is made, reference must be had to each individual composing the crew, the amount awarded for John's services belongs to Captain Magee,—not because he incurred the attendant risk, but because his contract with the plaintiff confers the right to receive it. Such a disposition of the salvage would add to the inducements which influence masters of vessels to undertake the performance of a dangerous service. If a steamer engaged in the coasting business,—as the General Clinch was,—be manned by hired slaves in whole or in part, and salvage earned by the crew should be awarded to the owners of the slaves, the temptation to incur risk would be withheld from him who alone if governed by cupidity, can command the performance of the duty. If the

Gourdin vs. West and Robertson,

danger to life is greater in this than in other employments, the owner can indemnify himself against the increased hazard by a stipulation for higher wages.

We do not perceive the analogy suggested between mariners and apprentices and hired slaves in respect to the compensation bestowed for salvage. The reward is offered to encourage personal labor and risk, and is distributed *per capita* among the adventurers, which distribution cannot embrace one who neither voluntarily incurs the danger, nor personally enjoys the compensation. As the service consists of different elements, it is argued that the actual value of the time and labor should be awarded to the hirer and the estimated value of the risk to the owner; but this is inconsistent with the apportionment made among mariners and apprentices, who are entitled to the consideration given for the whole service and not for a part. If the hirer is entitled to the fruits of so much of the service as consists of labor, his right must rest on the terms of the contract which secure to him the earnings derived from the undivided service.

The only case to which we have been referred, in which salvage was awarded to a slave, is *Mason et al. vs. The Blaireau*, (2 Cranch, 240.) The amount allowed was directed to be retained for the owner of the slave, who was then resident abroad, and it does not appear that any other claim was interposed. The conflicting rights of owner and hirer were not discussed nor adjudicated. It may be that the slave was a mariner shipped for the voyage under shipping articles, or that some contract was made stipulating for a disposition of the salvage. It is enough, however, that the question raised here was not submitted to the Court nor was it decided.

The consideration which leads a majority of the Court to sustain the judgment below is, that it is consistent with the agreement of the parties, construed according to those rules which regulate contracts usually entered into for the hire of slaves, and as distinguished from shipping articles. If John

Charleston, January, 1858.

was employed in a dangerous service and contrary to the terms of the hiring, it is admitted that the salvage awarded belongs to the hirer, because he assumed the risk and undertook to answer for the consequences of such service. If the service was authorized by the contract, then it would also belong to him, because it was incident to an employment for which the contract provides.

The motion to reverse the decree is therefore dismissed.

WHITNER and MUNRO, JJ., concurred.

WITHERS, J., dissenting. It is a necessary consequence of the relation of master and slave, that whatsoever of property the latter acquires belongs to the master. This follows, as a consequence, from the substantial principle, that the civil rights of the slave are centered in the master. The doctrine is more generally true in relation of master and slave than in that of master and apprentice. It is not disputed that if salvage be earned by an apprentice, not a slave, that acquisition will be the peculium of the apprentice, not of the master.

The ground upon which such acquisition is held to be appropriated to the person who holds a slave upon a contract of hiring, is, that he is the owner of the slave, *pro hac vice*, that is, for the term of the hiring, and entitled to all acquisitions meantime, as the absolute owner is generally.

Many of our cases have treated him who hires a slave for a term, as the purchaser of the services of the slave for and during that term; and such decisions are not only authority for us, but satisfactory authority, because they are founded on solid grounds. The question is whether such doctrine carries to such temporary purchaser the salvage awarded, under the law maritime, to the slave, who performs the office of humanity, which that law so anxiously encourages and rewards?

Gourdin vs. West and Robertson.

Salvage is the reward allowed by maritime law to persons, who, though not bound by duty nor induced by interest so to do, save a ship or its loading from impending perils of the sea, or recover them after actual loss at sea. Such a person is called a voluntary adventurer, in the cause of humanity, at sea, for like service on land, in case of fire, storm, or earthquake, does not meet with the reward bestowed by the law of the sea.

It is argued that the law maritime addresses the sentiments of the master of a vessel, and hence he is to represent the slave under his authority on hire in the apportionment of salvage, and to absorb it, because it is his action and risk that is encouraged and rewarded. The question occurs, why then is the award made *per capita*; why is it the peculium of the apprentice or common sailor? If the humane emotion of the master of a vessel is the object addressed, then in those cases where a slave may be the master, (and it is presumed he sometimes is,) the address, if effectual, must be to *his* sentiment of humanity reinforced by the reward in expectancy.

Then as to the risk, so great an element in this maritime principle of law. However, in a general sense a slave is property, he is a person when his life is at stake, and if that be forfeited in obeying a humane impulse, the loss is the absolute owner's, even though he be on hire, for if the master as in this case, hires his slave to a seafaring man, he knows that he may be called upon to perform the hazardous service of wrecking as incident to the service for which he is let to hire, and therefore, if his life be sacrificed, as the consequence of a wrecking adventure and by no special and blameable negligence on the part of him who hires, the entire loss of the slave as property is that of the absolute owner. The object of the maritime law of salvage, "looking (as expressed in 1 Sum. 400) to the common interest and safety of the whole commercial world, in cases of this sort," may well be

Charleston, January, 1868.

subservied by holding that the absolute owner of a slave, let to hire, has the inducement held out to him of salvage, by way of reward, to commit his slave to the hazards of wrecking when the contingencies of a seafaring life invite to the service, instead of clogging the contract of hiring with a restriction which would not harmonize with the enlarged humanity which lies at the bottom of the law of salvage, aiming at the great end of preserving life, in imminent peril, as well as property. Strongly corroborative of this view is the doctrine that the owner of the cargo of a salving ship is entitled to no salvage, because he is secure in the liabilities of others to reimburse his loss if it occur from a deviation by the master for salvage, while the owner of the vessel is held entitled to share liberally in the salvage, provided he has not clogged the master in respect to salvage adventure, by restrictive instructions, and in the latter case his reward will be far more restricted. This award to the owner, is founded upon the policy of encouraging the owner to forbear such odious and (as it would seem unexampled) instructions, and in such cases the amount awarded is irrespective of actual loss from consumption of time, enhanced wages, or loss of insurance: (vide more at large upon this subject the observations of Justice Story in the case of *The ship Nathaniel Hooper*, 3 Sum. 575.) it is presumed that the master has an implied authority from the owner to deviate or delay and imperil the ship in an adventure for salvage, and the owner shall freely participate in the reward consequent thereupon, to the end of an astute and high policy, to wit: that the master shall not be estopped, on the one hand, to render a great office of humanity for a great and common good, nor tempted on the other to imperil, unreasonably and recklessly, by the hope of selfish gain, the property of the owner, and multiply his liabilities, which would result from permitting him to absorb the entire reward. There seems to be a striking fitness in this reasoning, for the case in hand. There is an intelligible and politic principle in

Gourdin vs. West and Robertson.

it. It combines the interests of the absolute owner of the slave and of him who hires in just moderation, and blends both with the solid considerations upon which the law of salvage reposes. The master uses the ship of one and the negro of another in the enterprise for salvage. It shall be implied in the absence of express restriction to the contrary, that he has equally the authority of each so to do; and that each may be induced to permit the risk, he shall, by parity of reason, have the reward. The inducement to the master of the vessel, (and if owner and master it will be precisely the same,) being still sufficient to secure the exertion on his part which the law seeks with rewards to encourage to the reasonable extent, yet so adjusted as not to inflame selfishness extravagantly. One consideration makes it especially desirable to give to the owner the salvage awarded to or for the exertions of the slave. It is this: that if he who hires have the reward, he may be tempted himself to trespass upon humanity by sending slaves held on hire into reckless danger of life, in hazardous communications with a vessel, or persons in distress, where he would not risk himself or others who acted under their own sense of prudent restraint or circumspection, and when his own property or that of his owners, may not be involved in the risk, equally or at all. The only way to moderate a dangerous selfishness on the part of the master, in respect of the vessel, we have already seen, is to award salvage to the owner of it, and the reason is stronger to do the like towards the owner of the slave in proportion to the enhancement of the risk to which the slave will be exposed. So far as the decision of the Court is led by the idea that the reward sought in this action, is part and parcel of the emolument earned by the slave in the course of his labor and service, and as such belongs to the estate of the deceased who purchased such labor and service, (and this upon the authority of a current of our decisions,) it is believed that error lurks in that proposition. The authorities cited do

Charleston, January, 1858.

abundantly maintain, that salvage is awarded, not *pro opere et labore*, that it is not on any conception of *quantum meruit*: that it is above contract; that a Court of Admiralty will disregard a contract made by those who save with those who are rescued; that the service is gratuitous, and the reward decreed, not for the time employed, the value of what is saved (for how could life be estimated?) nor according to burthen of the labor, nor for the risk of life or property, for none of these singly, but for all combined, and in addition to all as well as in an eminent degree, the award is decreed, the aggregate fixed and the *pro rata* apportionment made among the salvors, upon the foundation of a great and common maritime policy, irrespective of all other elements of calculation. Risk of property by a salvor would be less meritorious always than the risk of his life, and mere labor and service consuming time and fatiguing body less so than either—and the risk of life being the risk of the owner of a slave, so far as the question in this case is concerned, this would point to the owner as the proper recipient of the bounty. There is not time, nor is there necessity to reproduce here, the authorities which amply sustain the propositions just above laid down. These propositions lift this case above the grounds upon which our own cases, touching owner and hirer, have been decided, which may be assumed to be right, but depend upon principles not at all common to them and the cause now before us. But if, in obedience to our cases, there should be apportioned to the defendants so much of the salvage awarded for John as would compensate for the mere service, labor or time, then it may be done by making the requisite estimate growing out of the evidence touching that matter.

It is admitted, that the plaintiff knew when he let his slave on hire that he was committed to a service of which wrecking was an incident, and from this the consequence is deduced, that wrecking being a part of the service which it was known

Gourdin vs. West and Robertson.

he might render, the emolument must go to him who bought the services. But *non constat*: the true proposition is, that he knew his slave might be employed in such extraordinary service or adventure and if lost thereby he could not call upon McGee for indemnity, yet he also knew that such risk was the owner's, and the extraordinary earnings would be his.

Having indicated, and aiming at no more, the prominent considerations which withhold a concurrence with the majority of this Court, extended illustration must be left to those who have leisure and taste to pursue the subject.

WARDLAW, J. I join in this dissenting opinion.

Motion refused.

Charleston, January, 1858.

CHARLES RUSSELL, FOR HIS ASSIGNEE, E. L. ADAMS, vs.
TUNNO, PINCKNEY & Co.

Law of Nations—Personal Property—Foreign Assignment—Contract—Attachment—Debtor and Creditor—Assignment—Evidence—Subscribing Witness.

The right to sell, transfer, and dispose of, personal property, belongs to the person of the owner, and such sale, transfer, or disposition, if valid where the contract is executed and according to the *lex domicilii*, is valid wherever the property is.

A voluntary assignment of personal property by a foreign debtor for the benefit of creditors, executed abroad, if valid there and according to the *lex domicilii*, takes precedence over liens by attachment subsequently taken out in the Courts of this State—the property being here at the time both of the assignment and the service of the attachment.

Non compliance with the provisions of the Act of 1828, in relation to assignments for the benefit of creditors, does not make the assignment itself void.

The Act of 1828, relates only to domestic and not to foreign assignments for the benefit of creditors.

Where the subscribing witness to an instrument is dead or beyond the jurisdiction of the Court, mere proof of his handwriting is insufficient to authorize the sending of the instrument to the jury.

The subscribing witnesses to an assignment were R. & M. both of whom were absent from the State. R., examined by commission, testified, that he remembered nothing about the transaction; he recognized his own signature and believed the name of M. to be his signature, but did not know the assignor. The signature of M. was otherwise proved:—*Held*, that the proof of the assignment was insufficient.

BEFORE MUNRO, J., AT CHARLESTON, JUNE TERM, 1857.

The report of his Honor the presiding Judge, is as follows:

“This was an action of *assumpsit* against defendants, as acceptors, upon the following bill of exchange:

Russell vs. Tunno, Pinckney & Co.

"\$2,383 07. MADISON C. H., Fla., Jan. 19, 1854.

"Ninety days after date pay to the order of Charles Russell, twenty-three hundred and eighty-three 60-100 dollars value received, and charge the same to

"JOHN C. McGEHEE.

"To Messrs. TUNNO, PINCKNEY & Co., Charleston, S. C.

"Endorsed, Charles Russell.

"Plea, non-assumpsit.

"Plaintiffs proved that Charles Russell, the nominal plaintiff, is the absent debtor of Joseph E. Adger, survivor, and Bancroft, Betts & Marshall, attaching creditors.

"That the bill sued upon was given by Charles Russell, the absent debtor, to A. P. Miller, a clerk of Bancroft, Betts & Marshall, who journeyed with him from Florida, with instructions to present it for acceptance and to keep it for him (Russell) until his arrival in Charleston.

"Miller presented it immediately on his return to Charleston and it was accepted on or about 28th January, 1854, and then by him delivered to George Carey, the bookkeeper of Bancroft, Betts & Marshall for safe keeping.

"Charles Russell never came to Charleston, and Joseph E. Adger, survivor, sued out an attachment on the 14th March, 1854, which was served on A. P. Miller, and Bancroft, Betts & Marshall, who made their returns, admitting possession of the draft under the circumstances.

"On the 24th May, 1854, Bancroft, Betts & Marshall sued out their attachment, which was served on A. P. Miller, and the present defendants, when Miller made a similar return.

"On the 4th August, 1854, an order was made by Judge Munro in both cases appointing Ettzel L. Adams, assignee, under the Act of Assembly 1844, on the usual terms, which were complied with.

"The defence set up was—

Charleston, January, 1868.

"First. That the bill of exchange sued upon was a mere accommodation to the nominal plaintiff, Russell, and drawn for a special purpose by the drawer, John C. McGehee, which Russell had not accomplished, and payment had been countermanded by the drawer.

"Next. That Russell, the plaintiff, had assigned the said bill of exchange to the drawer, John C. McGehee, prior to the issuing of the attachments.

"No proof was offered by the defendants as to the consideration of the bill of exchange.

"To prove the assignment relied on, the defendants counsel produced a commission executed in New Orleans, containing the testimony of three witnesses, L. F. LaRoque, one of the subscribing witnesses, and George Rareshide, and J. M. Breedlove, to which the assignment was annexed. The testimony of Louis LaRoque was as follows :

"To first interrogatory he answered : I don't know any of the parties to this suit. To the others as follows :

"Second Interrogatory. Look at the deed purporting to be a deed of assignment bearing date the 8th day of February, 1854, from Charles Russell to John C. McGehee, and say whether you saw the said Charles Russell sign his name to the said deed, and whether the name Charles Russell thereto signed is in his own hand-writing, and the seal thereto affixed or acknowledged, and the name written by him in your presence, and whether the said Charles Russell did not deliver the said deed, and in what way, and whether the names of William Monaghan and L. LaRoque are not in the hand-writing of the said witnesses, and written in your presence ?

"Answer. I don't remember anything about this transaction. I signed my name as a witness. It is in my hand-writing, and I believe the signature of Monaghan to be genuine.

"Third Interrogatory. After the said Charles Russell had signed his name, and the witnesses had signed, what was done with the said deed ? Look at the notarial certificate thereto

Russell vs. Tanno, Pinokney & Co.

annexed and say whether the said certificate is under your hand and notarial seal, and whether the facts therein stated are correct?

"Answer. I don't remember what was done with the deed. The certificate annexed I believe to be in the hand-writing of Monaghan and the signature and seal thereto to be genuine.

"Fourth Interrogatory. Do you know anything more which may tend to show that the deed hereto shown you is authentic? If so, declare.

"Answer. I was clerk for Monaghan for nearly a year, and have seen him write very often, daily whilst I was in his employ.

"To Cross Interrogatories he answers as follows:

"First Cross Interrogatory. If in answer to the first interrogatory in chief you say you know the plaintiff, Charles Russell, state when and where, and how you first became acquainted with him, and especially how long you had known him.

"Answer. I don't know the plaintiff.

"Second Cross Interrogatory. If you answer the second interrogatory affirmatively and say that Charles Russell did deliver the deed therein mentioned, you will please say to whom he delivered it? Was the assignee in the said deed named (John C. McGehee) present, or was any one present who was authorized to represent him, or to accept the said deed for him?

"Answer. I don't remember anything about this deed.

"Third Cross Interrogatory. If you answer the third interrogatory in chief affirmatively, you will please say what you did with the said deed after having annexed to it your notarial certificate? To whom did you hand the said deed and certificate? Did you not hand or give it, or put it into the possession of Charles Russell himself? And did not the said Charles Russell take the said deed away with him?

"Answer. I have answered this above. I don't remember.

Charleston, January, 1858.

"Fourth Cross Interrogatory. Where did Charles Russell go to after executing the said deed? Did he remain in New Orleans, and how long did he remain there? Is he still in New Orleans.

"Answer. I don't know anything about him.

"Fifth Cross Interrogatory. If you know any other matter or thing favorable to the present real plaintiff, Ettzel L. Adams, state the same as fully as if thereto specially interrogated?

"Answer. I know nothing further in the matter.

"The two other witnesses examined under this commission testified that they knew nothing of Charles Russell or of the execution of the assignment, but both had been clerks of the notary, William Monaghan, were familiar with his signature, and recognized his signature as a witness to the assignment produced and annexed to the commission. They also testified that Monaghan had left New Orleans clandestinely, and had gone whither they knew not.

"No other testimony was produced by the defendants.

"The plaintiff's counsel objected that the testimony offered in proof of the execution of the assignment was not sufficient to allow it to go to the jury, especially as the signature of Charles Russell, the assignor, was not proved. I thought that proof of the signature of an attesting witness was testimony sufficient to authorize me in submitting the assignment to the jury for their consideration, and so ruled.

"The plaintiff's counsel insisted, first, that the assignment was not proved. Next, that there was no proof of the time of its delivery, and lastly, that it did not transfer the bill of exchange which had been attached and upon which this action was brought.

"I left the proof of the execution and delivery of the assignment of Charles Russell, to the jury, and instructed them that if satisfied that the assignment had been made and delivered before the attachments were served, that I had no

Russell vs. Tanno, Pinckney & Co.

doubt the bill of exchange sued on, passed under the assignment, and the defendants should have a verdict."

The plaintiff appealed and now moved this Court, to set aside the verdict which was for the defendants, and for a new trial, upon the grounds:

1. Because the writing offered as an assignment made by the plaintiff, Charles Russell, to John C. McGehee, was not proved to be such and should not have been allowed to go to the jury as evidence, at least without proof of the signature of Charles Russell.

2. Because even if the said instrument had been proved to be the assignment of Charles Russell, it did not transfer the bill of exchange sued on in this case to John C. McGehee, but the said bill of exchange was liable to the attaching creditors of Charles Russell.

3. Because there was no proof whatever of the time of the execution of the said assignment, nor of its delivery at any time prior to the issuing and service of the attachment against Charles Russell at the suit of Joseph E. Adger, survivor, when such proof was necessary to supersede the lien of the attaching creditors, and could have been offered by the defendants if in truth the execution and delivery has been prior to the attachment.

McCrady, for appellant. On first ground. 1. The testimony by commission proved only the signature of the absconding witness, Monaghan. Bull, N. P. 171. "If the defendant plead *non est factum*, the plaintiff must prove the execution of the deed and proof that one who called himself B. executed, is not sufficient if the witness did not know him to be the defendant," and cites the case of *Marion vs. Bates*.

Charleston, January, 1858.

Hill, 4. Geo. 2, which is not reported. *Parkins vs. Hawkshaw*, 2 Stark. R. 239, 3 E. C. L. R. 393. The subscribing witness to a bond stated that he saw it executed by a person who was introduced as Hawkshaw, but he could not identify him. Holroyd, J., citing Bul. N. P., deemed evidence as to identity to be requisite, and non-suited plaintiff.

2. Proof of the signature of subscribing witness is not sufficient without proof of signature of obligor or grantor. *Plunket vs. Bowman*, 2 McC. 138.

On second ground. It must be observed that there was no proof of the endorsement of Charles Russell, offered either by the plaintiff or defendant.

1. The assignment, if proved, did not transfer the legal title to the bill of exchange. 1 Selw. N. P., p. 297. Story on Bills of Ex., § 201. Note 3 to same. At most then McGehee had only an equitable interest.

2. The bill of exchange was liable to the attaching creditors in preference to the assignment. This is an assignment by an insolvent for the benefit of creditors made out of this State, to an assignee living out of the State. Two cases in our own books may be cited as concluding this question, viz: *West vs. Trupper* and *Kimball*, 1 Bail. 193, and *Greene vs. Mowry*, 2 Bail. 163. But in neither of them was the point now intended to be made, brought to the view of the Court. Assignments under Bankrupt Laws do not prevail over subsequent attaching creditors. *Tophams, Assignee, vs. Chapman*, 1 Mill, 283; Story's Conf. Laws, sect. 410 to 415. Even a voluntary assignment before the action or effect of a Bankrupt Law, will not prevail against a subsequent attachment. *Crowder, Clough & Co. ads. Robinson*, 4 McC. 519. Nor will a voluntary assignment made by the Bankrupt after the effect of the Bankrupt Law, have any greater effect. *Holmes vs. Renison*, 20 John. 229 at 267; Story Conf. Laws, sec. 418. "Neither is it true that even the voluntary conveyances of parties in all cases are to be held valid where

Russell vs. Tunno, Pinckney & Co.

they are prejudicial to the rights and remedies of our own citizens." Story Confit. Laws, sec. 416. In Massachusetts, assignments of insolvents for benefit of creditors were not allowed to prevail over subsequent attaching creditors, *while the Courts of that State had no power to make the trustee or assignee account.* *Widgery vs. Haskell*, 5 Mass. 144 at 154. So also in Maine it was pointedly held, "that a general assignment made by an insolvent debtor, in another jurisdiction, should not be permitted to operate upon the property in that State, so as to defeat the attachment of a creditor residing there." *Fox vs. Adams*, 5 Greenl. R. 245. The same doctrine, it is said, has been held in Louisiana. 14 Martin's Rep. p. 93-99, in the case of *Oliver vs. Townes*. Now, the Act of Assembly, entitled "An Act regulating assignments of debtors," passed 1828, (6 Stat. 365,) secures certain rights to creditors, under general assignments, which are unavailing where assignments are made out of the State. Upon principle and authority, then, such assignments out of the State should not be allowed to prevail against our attachment laws. *Ingraham vs. Geyer*, 13 Mass. 146 at 147, 148.

On third ground. 1. There was no proof of the time of execution. We have no proof relative to the assignment, but the proof of the handwriting of the subscribing witness, Monaghan, and it does not appear that he knew Russell. His certificate is no proof, as there is no proof that he was a commissioner of Florida. The certificate of Sessions is no authentication; it should itself have had the certificate of a Judge. 2. There was no proof of delivery before the service of Adger's attachment. The certificate of Record is dated 4th April, 1854, while the attachment was served 14th March, 1854. And there is no proof of notice to Adger, or even to Bancroft, Betts & Marshall, prior to their attachment of 24th May, 1854. Now, if the assignment was really executed in New Orleans on the day of its date, and had been sent by mail, where is the letter

Charleston, January, 1858.

accompanying it? Let it be produced, and we will see whether it did not contain stipulations or conditions apart from the assignment. If sent by a private hand, the witness should be produced. If the assignee, who was a creditor, hesitated to accept it, then during his hesitation the creditors here had a right to attach. *Crosby vs. Hillyer*, 24 Wend. 280; 6 Pick. 341; 5 Cra. 299.

Petigru, contra, cited 3 How. U. S. 483; 6 Binn. 50; 2 Green. Ev. § 295; 8 Pick. 143; 1 Johns. Ca. 230; 3 Johns. R. 470; 2 East, 250; 6 Pet. 137; 2 Bail. 141.

The opinion of the Court was delivered by

WITHERS, J. Charles Russell assigned property, real and personal, including choses in action, he and the assignee being domiciled in Florida, which was the *situs* of the bulk of the property; and among the choses in action which the terms of the deed will embrace, is a bill of exchange, drawn upon and accepted by the defendants, in favor of Russell and held for him here. We shall assume, for the present, that the deed was duly executed in New Orleans, at the date it bears, which is February 8, 1854, or, at any rate, prior to the service of attachments by certain creditors here, on the 14th of March and the 24th of May, 1854. Upon this case a question is raised, whether the right of the assignee, though prior in date, according to the force and effect of the assignment, shall yield to the liens of the attaching creditors, though posterior in date.

It is to be premised that such an assignment as this would be perfectly consistent with our law, if executed here in due form; and we, of course, assume that it is agreeable to the law of Florida, until the contrary appears. It is also to be observed, that the distinction is clear and fundamental, upon the question now in view between a voluntary disposition of

Russell vs. Tunno, Pinckney & Co.

personal effects executed in another jurisdiction, and including certain effects here, and a disposition of such property *in invitum*, by operation of law. In the latter case the operation of the foreign law would not be recognized as regulating the disposition of an insolvent's effects in South Carolina, upon the general principle that such law is necessarily *intra territorial*. The position is illustrated by the case of *Crowder, Clough & Co., ads. Robinson*, 4 McC. 519. In the former case, however, the rule is widely different, where the act of the owner gives the law of disposition. It was stated in the case of *Sill vs. Worswick*, 1 H. Bl. 690, as follows: "It is a clear proposition not only of the law of England but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner, both with respect to the disposition of it, and with respect to the transmission of it, either by succession or by the act of the party. It follows the law of the person. The owner in any country, may dispose of his personal property"—per Loughborough. In *Doe d. Birt-whistle vs. Vardill*, 5 Barn. & Cresw. 438-52, Chief Justice Abbott said, "personal property has no locality. And in respect to that it is not correct to say, that the law of England gives way to the law of the foreign country; but it is part of the law of England that personal property should be distributed according to the *jus domicilii*." "The same doctrine (says Judge Story) has been constantly maintained, both in England and America, with unbroken confidence and general unanimity." Conflict of Laws, sec. 380.

It is upon such basis that our decisions have uniformly proceeded in recognizing a valid prior voluntary assignment of personal property, executed in another jurisdiction, as overriding a subsequent attachment on the same property here.

Charleston, January, 1858.

It is argued, however, that voluntary conveyances of parties abroad are not to be held valid in all cases, as where they are prejudicial to the rights and remedies of our own citizens; and it is suggested, that this consideration has been overlooked, because not brought to the attention of the Court, when it has been decided that they should outrank the posterior liens under our law of foreign attachment. There are such exceptions, certainly, to the general rule of *lex domicilii*, (being part of the *jus gentium*,) which general rule is, that the law of the domicile should determine the validity of every transfer, alienation, or disposition, made by the owner of his goods and chattels and choses, whether it be *inter vivos*, or post-mortem. These exceptions are founded upon the nature of the particular property, the transfer of which is regulated by local laws. Among such exceptions have been mentioned contracts respecting public funds and stocks of incorporated companies. "But (says Mr. Story) contracts to transfer such property would be valid if made according to the *lex domicilii* of the owner, or the *lex loci contractus*, unless such contracts were prohibited by the *lex rei sitæ*." Conf. Laws, sec. 383. It is undeniable, as was said by C. J. Tilghman, in *Moreton vs. Milne*, 6 Binn. 361, that every country has the right of regulating the transfer of all personal property within its territorial limits; but when no positive regulation exists, the owner transfers it at his pleasure."

It is very questionable whether Courts, drawing authority only from the common law, are warranted in establishing any such "positive regulations;" thus qualifying the general and wholesome rule of comity which recognizes, upon the authority of the well-settled law of Nations, the *lex domicilii*, which itself is founded upon the nature of personal property, as interpreted by the common law of England, as well as the civil law. It becomes the more doubtful when we remember that this law of domicile, acting upon movables transitory in

Russell vs. Tunno, Pinckney & Co.

their nature, subverses the general convenience of nations, and equally affects the subjects and interests of all, and especially commercial sovereignties, which is so well set forth by Judge Story, in his 9th chap. of the Conflict of Laws. It is far safer to leave any contravening positive regulation to the wisdom and discretion of the law-making power, who alone should resolve how far the just rights and interests of our citizens may claim interposition. We think, therefore, that the course of our decisions upon the contest between assignments abroad and our attachment law here, is by no means without solid foundation, if the rule adopted was properly open to debate. Nor are we disposed to yield to contrary views found in decisions in Louisiana, Massachusetts and Maine. Such views, if generally adopted, would lead to the sequestration, by each sovereignty, of the goods of a foreigner or of a citizen of another of these States, found within his territory; and it is so doubtful, to say the least, whether that consequence could be for the benefit of any people, that we should await the command of the supreme power before we would move in that direction. Besides, we observe, that in Louisiana the Court thought that it discovered a peculiar necessity for its position in the circumstances of the commerce of New Orleans, and, like the Court of Massachusetts, invoked the rule of law said to prevail in each, that actual delivery of personalty, not symbolical, was requisite to complete the transfer of title, even of a ship, as in the case in Louisiana. These decisions do not seem to have won the approbation of Judge Story, as we think may be discovered in the chapter above cited. And it may be added, that in some of them the case was supposed to be varied by the question, whether the attaching creditor had notice of the assignment before he laid his lien; and the like consideration has been suggested in this argument. We are not aware that this has any influence with us.

We are next presented with the position that the Act of

Charleston, January, 1858.

1828, 6 Stat. 365 "Regulating assignments of debtors," is such a "positive regulation," in the sense of Chief Justice Tilghman as supersedes all assignments that cannot be conformed to the scheme of administration therein prescribed.

In speaking of the assignment involved in the case *Crowder Clough & Co. ads. Robinson*, it was said, "independently of the interest which creditors residing here may have in the property assigned, there is no question that as between the parties the assignment would be binding here as well as in England; and supposing it to have been voluntary and binding according to the laws of that country, *and not inconsistent with our laws*, the Courts, here, would, upon well settled principles of universal law, be bound to give it effect and operation." It is quite true, therefore, that if the assignment now in question be inconsistent with the Act of 1828, it cannot operate here at all, as against a rival creditor, our own citizen.

The first clause of that Act shows that the provisions relate alone to an assignment by a debtor for the benefit of his creditors, and such is the assignment now before us. It makes it lawful for the creditors, when such an assignment is made, and they are authorized and empowered, to appoint an agent, one or more, to act jointly with the assignees, one or more; for which purpose the assignee is to call the creditors together within ten days from the execution of the assignment. The consequence for default in this respect is, that the creditors may meet together and appoint their agent who shall supersede the defaulting assignee. Any sales or transfers by the latter within the ten days specified, are declared void. Then a mode of deciding contested questions is prescribed; proceeds of the sales of the assigned property are to be deposited in bank in the joint names of the assignee and agent; they are to account before the creditors or their committee every three months; and the amount of commissions is prescribed. Such is the scheme of the Act of 1828, compressed into a

Russell vs. Tunno, Pinckney & Co.

narrow abstract. It seems to us, manifestly to contemplate, not the validity of assignments, but the administration of them, a regulation in restraint of assignee as well as agent; and a priority of right among creditors prescribed in an assignment cannot depend upon legislation having such purview only. It nowhere discloses that a non compliance with any or all of its provisions shall render the assignment itself null and void, in whole or in part, whether such default proceed from agent, assignee, or creditors, some or all. It is necessarily territorial in its scope, as much so and for the same reasons as the bankrupt or other laws, of a foreign country beyond its limits. There is also reason to contend that the intent of the Act did not reach assignments made without our limits, because the creditors are to be called together within ten days from the execution of the deed, which could scarcely have been deemed practicable in the case of an assignment in foreign parts. A majority of the amount of debts represented by the creditors shall govern in the appointment of an agent. This scheme could scarcely look to an assignment executed in another state, or country; distant it might be; to be administered there; with the bulk of the property there; all the creditors there, perhaps, save one or two; and little property here, perhaps only a chose in action. Some at least of these circumstances attend the present case. These considerations do not favor the conception that the said Act, meant either to draw to itself the administration of an assignment executed elsewhere, or failing in that, to render it void. If it could be applied to this assignment, and ought to be and is not, still the rights of creditors could not be affected however the powers and conduct of the assignee might be, unless indeed such non conformity be adjudged to work the nullity of the instrument of assignment, which we have seen it would not do in the case of an assignment wholly domestic. Nor ought so grave a consequence to rest upon inference, strained inference, being at the same time so much

Charleston, January, 1858.

in disagreement with that doctrine of comity which recognizes here the disposition of personalty executed elsewhere and valid there; a doctrine itself founded upon a cardinal view of the nature of personalty, a comprehensive consideration of great and general interests, so frequently adopted in our own adjudications, as it has been in so many other enlightened sovereignties, and equally favored by the civil and common law, and, therefore, finding its way into the *jus gentium*.

It is not easy to see why there should be in the Act of 1828, any greater efficacy to avail a creditor here than he could find in our attachment laws. These last have repeatedly been held to be unavailing against a prior assignment abroad, valid there, and not otherwise, on its face, here; and such decisions have been made both before and since the Act of 1828. Examples are presented in *West vs. Tupper & Kimball*, 1 Bailey 193; *Green vs. Moury*, 2 Bailey, 163; *Mitchell and others vs. Smith*, 3 Strob. 240.

We do not touch the question whether an assignor abroad, who has given an "undue preference," in the sense of our insolvent debtors' law, might not be met with an obstacle, if arrested here, within the period prescribed, and asking for the benefit of that law, as against a local execution creditor.

As to the consideration, that the assignment in question confers upon the assignee an equitable rather than a legal title, it is enough to say, that in either case, the assignment being good, it confers the right to demand and receive payment of the debtor, though the *lex fori* touching the form of remedy may require the use of the assignor's name. "This (says Justice Story, sec. 398, Conf. Laws,) is in perfect coincidence with the law of England and America.

So much upon the ground and the argument founded on the Act of 1828. The attaching creditors are not entitled to maintain their position in respect to that Act.

Russell vs. Tunno, Pinckney & Co.

We come now to the question of the law of evidence—whether there was evidence of such character as warranted the Court in placing the assignment before the jury and them in finding it well executed, and taking rank as of its date?

This question also is attended by contrariety of decision; for there is not uniformity of opinion in English or American cases, perhaps we may say not even among our own. We have, however, a rule prescribed in *Plunkett vs. Bowman*, 2 McC. 138, which we think it proper to follow so far forth as this—that where a subscribing witness to an instrument is dead, or beyond the jurisdiction, something more than merely the proof of his handwriting is required before the defendant shall be held connected with the paper as maker. That the assignment in this case came in collaterally, that is, was not the cause of action, will not present occasion to vary the rule of evidence; for in either case the question is whether the paper propounded is sufficiently proved to go to the jury, and the decision of the Court is invoked. In *Edgar, admr., vs. Brown*, 4 McC. 91, it was adjudged, that proof of the signature of the obligor to a bond, executed in Delaware, though no proof as to the signature of the attesting witnesses, who were not within the jurisdiction, was given, was sufficient; and this by virtue of the Act of 1802, which dispensed with the attendance of witnesses to bonds or notes, unless the defendant should swear or affirm that the signature was not his, and providing “that the *signature* to such bond or note may be proved by other testimony.” But the ruling in *Edgar vs. Brown*, was in conflict with *Myers vs. Taylor*, 1 Brev. 245, which held, that under the said Act the handwriting of the attesting witnesses should be proved as well as that of the obligor. To the same effect was the case of *Paisley vs. Snipes*, 2 Brev. 200, where the handwriting of the attesting witness was proved, though not called under the Act of 1802, yet it was adjudged that the signature of the maker of the note,

Charleston, January, 1858.

though by mark, must also be proved. These two last cases were in manuscript when the case of *Edgar vs. Brown*, was decided, and probably were unknown to the Court. In the latter case Judge Johnson did observe, "I am strongly inclined to the conclusion, that the evidence was admissible on the principles of the common law"—he may be taken to have meant sufficient, that is, proof of the handwriting of the obligor merely. But he did not so rule, and placed the case upon the Act of 1802. Then we have the later case of *Trammel vs. Roberts and others*, 1 McM. 305, where we find this: "At common law the subscribing witness must have testified in person, and in case he were beyond the reach of the Court, then other witnesses by proving his handwriting, and the signatures of the makers of the note, would furnish legal, though secondary, evidence of the same facts."

What proof have we in the present case? Of two witnesses, one is examined and asked whether he saw Charles Russell sign the deed, whether his name thereto affixed is in his own handwriting, and the seal affixed or acknowledged by him—whether he delivered the deed, and how. He answers, "I don't remember anything about this transaction. I signed my name as a witness. It is in my handwriting, and I believe the signature of Monaghan (the other witness) to be genuine. I don't know what was done with the deed. I don't know the plaintiff. I don't remember anything about this deed. I don't know anything about Charles Russell." Other witnesses verified the signature of Monaghan as attesting the deed, and also what purported to be his certificate, in capacity of commissioner under authority of Florida, and it appeared that he had departed from New Orleans, and was not otherwise accounted for.

Such was the whole proof of the execution of the assignment.

It is evident that the witness examined instead of supporting rather weakened the plaintiff. He knew nothing of the

Russell vs. Tunno, Pinckney & Co.

identity of the obligor; nothing as to the delivery or disposition of the deed. He says nothing of the presence of the assignee. He shook if he did not rebut such presumptions as might have arisen from proof of his handwriting merely, where that might have been accepted, and he did not even say he would not have signed the paper if he had not seen it duly executed. So that the execution of it rests solely on such inferential presumption as may arise out of the signature of Monaghan, affected more or less as different minds may view it by what the witness examined has said. In such circumstances we think our own cases teach, that the writing of Russell, the assignor, or something else should have been proved before he could be held connected with the assignment, and the delivery (a very important point in this case) be presumed as of even date with the deed. It can be easily conceived (cases have been known indeed), that one may assume a name and palm himself off on witnesses fraudulently, while personating another and forging his name. Loose and facile presumptions as to delivery and the time of it, may work much injustice, especially in such cases as this. We think *Plunkett & Bowman*, and *Trammell & Roberts*, well founded, (*Simms & De Graffinreid*, 4 McCord, 253, may perhaps have proceeded on the ground that the instrument there was a conveyance of realty, requiring two witnesses; but there also the handwriting of both witnesses and grantor was required to be proved). There is support for our cases and the opinion we now entertain in conformity to them.

One is *Parkins vs. Hawkshaw*, 2 Stark. N. P. 239, (3 Com. Law, 398). The witness saw a person introduced as Hawkshaw execute a bond, and he gave some description of his person but could not identify him as the defendant. Holroyd, J., nonsuited the plaintiff. In the case of *Nelson vs. Whittall*, 1 Barn. & Ald. 19, Bailey, J., said, "It is laid down in Mr. Phillips' treatise on Evidence, that proof of the handwriting of the attesting witness is in all cases sufficient. I always

Charleston, January, 1858.

felt the difficulty, that that fact alone does not connect the defendant with the note. If the attesting witness himself gave evidence he would prove not merely that the instrument itself was executed, but the identity of the person so executing it. But the proof of the handwriting of the attesting witness establishes merely that some person, assuming the name which the instrument purports to bear, executed it: and it does not go to establish the identity of that person, and in that respect the proof seems to me defective." This reasoning was adopted and distinctly converted into a rule of law by the concurrence of Bailey and three other Barons of the Exchequer, in *Whitlock vs. Musgrove*, 1 Exch. 511. The action was on a promissory note executed by the maker using a mark. In addition to proof of the writing of the subscribing witness, some proof in addition of the identity of the party sued and the maker was held necessary. (In such a case, a mark being used, our decisions would appear to regard the proof offered to be sufficient, *Bussey ads. Whitaker*, 2 N. & McC., 374.) "I quite agree (said Bailey) it is not necessary to prove the handwriting of the defendant; but if you do not prove that you must prove something else to connect the party sued with the instrument." Examples were suggested, as that the instrument might designate the party by residence or otherwise, and the evidence might show the correspondence of the defendant, and there may be various other means of attaining the end, *prima facie*. It is seen from this case that the point was long *questio vexata* in England, and it was conceded that Lord Tenterden, followed by Best, held the contrary opinion. But it is presumed, that the case last cited, concurred in as it was, by Lord Lyndhurst, may be regarded as strengthening our conclusion.

Some evidence was necessary in addition to what was adduced on the circuit, to show the due execution of the assignment by Russell, as proof of his handwriting or some-

Russell vs. Tanno, Pinckney & Co.

thing else to connect him with the instrument, before the paper could go to the jury.

And upon this ground a new trial is ordered.

WARDLAW and GLOVER, JJ., concurred.

WHITNER and MUNRO, JJ., thought the proof in reference to the execution of the deed of assignment by Russell, made a *prima facie* case properly submitted to the jury, and their verdict should not be set aside. Upon the other point made in the case they concurred with the majority.

New trial ordered.

Charleston, January, 1858.

EDMUND A. GIBBES vs. HUGH E. VINCENT.

Death, Presumption of—Evidence.

Where, shortly after a vessel sailed, a violent storm arose and prevailed along the coast:—*Held*, that after the lapse of three years without any tidings of the vessel or any on board, the death of the captain during the storm might be presumed.

BEFORE GLOVER, J., AT CHARLESTON, FALL TERM, 1857.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Ruledge, Whaley, for appellant, cited 1 Bail. 507; 1 Green. Ev. 46, 47, note.

De Saussure, contra, cited 1 Green. Ev. 53; *Sellick vs. Booth*, 1 Y. & C., 116; 2 Green. Ev. 299; 1 Strob. 14.

The opinion of the Court was delivered by

GLOVER, J. In an action by the plaintiff against A. G. Johnson, the defendant became his bail in December, 1853, and in April, 1856, judgment was entered up against the principal.

This action is brought against the defendant as surety on the bail bond, who resists a recovery on the ground, that his principal died before the judgment was entered up against him. The proof was that A. G. Johnson was the captain of a schooner named the "Edmondson" which sailed from a port on the Delaware Bay, 4 September, 1854, for some port on the north coast of South America; that a violent storm

Gibbes vs. Vincent.

prevailed along the coast in September of that year, and that neither the vessel, officers, or crew have since been heard of. The jury found for the defendant, and the plaintiff moves for a new trial on the ground, that the evidence proved that A. G. Johnson had not been missing or absent for seven years, and that there was no evidence of his death and that the jury, disregarding the evidence, and in defiance of the law, found a verdict for the defendant.

The rule, that the presumption of a continuance of life ceases when the person has been absent and has not been heard of for a period of seven years, it is argued is a legal presumption, and cannot aid the defence because the period limited to sustain it has not yet expired. If the presumption of death, arising from lapse of time, be a legal intendment, then the inference is certain and as a rule of law would be obligatory on the jury; but such a presumption is rebuttable—*presumptio legis tantum*—and may be disproved either by direct or circumstantial evidence, the effect of which the jury and not the Court must determine.

It is not, however, from the presumption arising alone from the length of time since Johnson has been heard of, that his death is inferred, but from the prevalence of a violent storm on the track of his vessel about the time he sailed, and that neither the "Edmondson," he or his crew have since been heard of. The conclusion of his death is inferred from a cause adequate to produce it, coupled with the fact that we have no tidings of him since. In an action on a policy of insurance on a ship and cargo, it was held, that there is no fixed rule of law with regard to the time after which a missing ship shall be reported to be lost. It is a question of presumption to be governed by the circumstances of the particular case. (*Houstman vs. Thornton*, 3 Eng. C. L. R. 88.) And Mr. Greenleaf says, the jury may find the fact of death from the lapse of a shorter period than seven years if other circumstances concur, as if the party sailed upon a

Charleston, January, 1858.

voyage which long since should have been accomplished, and the vessel has not been heard of. (1 Green. Ev., 46 § 41.) Resting upon similar circumstances, and after an absence of only two years, the Prerogative Court has presumed the death of a party and has granted administration. (In re *Hutton*, 1 Curt. 595.)

The jury to whom all the circumstances of this case were submitted, having concluded that A. G. Johnson was lost with his vessel and crew in the storm of 1854, we cannot say that their verdict was not authorized by the evidence because only three years had elapsed.

Motion dismissed.

WARDLAW, WITHERS, WHITNER AND MUNRO, JJ., concurred.

Motion dismissed.

Ex parte Hewitt.

EX PARTE OLIVER HEWITT.

Parent and Child—Infant, Custody of.

Upon a question between father and mother as to the custody of their infant child, the law gives the preference to the father as the head of the household, and without sufficient cause shown the custody will not be given to the mother.

BEFORE WARDLAW, J., AT BEAUFORT, FALL TERM, 1857.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Screven, De Saussure, for appellant.

McGowan, contra. The wife has voluntarily left her husband, and now asks the Court to take her infant son from his father and deliver him to her. The law regards the father as the head of the family; obliges him to provide for its wants; and commits the children to his charge of whom he is guardian *by nature and by nurture*. McPher. on Infants, 61; Forsyth on the Custody of Infants, 11 & 29; 2 Kent, 211-194; Shelford on Marriage and Divorce, 410-416; 18 Wend. 637; 19 Wend. 16; *The King vs. Greenhill*, 4 Ad. & Ellis, 624; 5 Ad. & Ellis, 441; 2 Hill, 364; *The People vs. Meriam*, 8 Paige, 48; 25 Wend. 68-72, 83-106, and also 3 Hill N. Y. 404; 2 & 3 Victoria, c. 54; 2 New York, R. Statutes, 148; *Ex parte Schumpert*, 6 Rich. 344.

Mr. Robert, the father, is here on the defensive; he asks nothing of the Court but to be left in the enjoyment of his natural common law right of guardian by nature and by nurture.

Charleston, January, 1858.

1. None of the cases go so far as to give a *paramount right* to the wife, *even within the period of nurture*. Supposing the right of father and mother to be equal (the mother has never nursed the infant) then this proceeding must fail, "*melior est conditio possidentis*," &c.

2. The wife has left her husband's house—so far as we are informed she is living in violation of her duty; her condition is not fixed in law. The Court will never compel a father to give up his child to the mother, when the mother has voluntarily separated from her husband without *either judicial decree or mutual consent*. *The People ex relatione Nickerson*, 19 Wend. 16.

3. Most of the cases where the right of the mother has prevailed have been cases where the mother *already had the child*, and the father attempted to deprive her of it. 8 John. 328; 13 John. 418; 4 John. Ch. 80.

The father is not to be deprived of the custody of his child unless it is shown that he has been guilty of *cruelty or personal ill usage to the child itself*. This phrase including the case of *moral contamination* to the child. Forsyth Custody of Infants, 31.

1. The question of "*sevitia*" to the wife is not the question here; we are not in this proceeding called upon to enquire whether Mrs. Robert was justified in leaving her husband.

2. There is not a decent pretext of *personal cruelty to his only son*, for the custody of whom he is now struggling.

3. No proof of danger *as to moral contamination*. The proof is overwhelming in his favor. *Ball vs. Ball*, 2 Sim. 35. It will be *better for the infant to remain in the custody of the father*—does not nurse mother—father is rich, mother poor,

Ex parte Hewitt.

—father owns nurse—the child is a *boy*—his father reared respectable daughters—the parents may come together.

Petigru, same side.

The opinion of the Court was delivered by

GLOVER, J. On the application of Oliver Hewitt a *habeas corpus* was obtained, commanding Lucius C. Robert to have the bodies of Alice Robert, his wife, and Laurel Point Robert, his son, by him alleged to be illegally restrained, before Judge Wardlaw, &c.—L. C. Robert with Alice his wife, appeared and made a return denying any illegal restraint of his wife and excusing the absence of his son. After hearing affidavits and argument of counsel, the judge ordered that Mrs. Robert “be at liberty to go whithersoever she pleased,” and that L. C. Robert enter into recognizance to produce his son on some future day, that the claim of the said Alice to have the said infant might be considered and determined, with leave to the parties, in the meantime to prepare affidavits.

On the 12th December the application in behalf of the said Alice to have the custody of her infant son was heard, and after argument, the judge observes, “I was of opinion that Mrs. Robert’s character was good, but that she had failed to sustain by credible witnesses, the charges against her husband which he denied and, as far as practicable, seemed to have disproved.

“I thought that the immediate interest of the child would not suffer from its remaining with the father, and that its prospective interests in a mere pecuniary view would be thereby greatly promoted, and so far as I could see in a moral view not be endangered. I indicated my opinion and would have made an order discharging the said Lucius C. Robert from his recognizance and from further attendance, but having received the annexed notice of appeal, I directed the recog-

Charleston, January, 1858.

nizance to stand to abide the order of the Court of Appeals in the matter."

When the order was made that Mrs. Robert be at liberty to go whithersoever she pleased, accompanied by her brother Oliver Hewitt, she voluntarily left her husband and still lives separate and apart from him, and also left her infant son, now about seven months old, in his custody, where it has since continued.

The application is renewed in this Court to change that custody and to transfer it from the father to the mother.

Except so far as the decision of the question involved makes it necessary, we will not enquire into the causes alleged in excuse for the separation. Whether Mrs. Robert shall return to her husband, is a question demanding grave consideration and which she must determine, aided by the counsel of wise and prudent friends. Our duty is to settle the conflicting claims of herself and her husband to the custody of their infant son, while they may continue to live apart.

It is assumed in the argument "that the father has no superior right over the mother to the custody of his infant children, and that other things being equal, the mother's claim is to be preferred, as to the custody of infants within the age of nurture." This is not the language of the law, which, looking to the peace and happiness of families and to the best interests of society, places the husband and father at the head of the household. By the common law the legal existence of the woman is suspended during the marriage, and the law even excuses some offences committed by her in his presence, expressly upon the presumption of that coercion which her subjection implies. The obligation imposed on the husband to provide for their wants and protection, makes it, necessary that he should exercise a power of control over all the members of his household. That divided empire in the government of a family, on which the argument proceeds, is not consistent with the welfare of the wife and children,

Ex parte Hewitt.

and has not the sanction of the law. His authority however, is that of a mild and considerate ruler, tempered by those happy influences which a prudent wife exercises over her husband, and on which in a great measure the fortunes of his house depend. When their rights to the custody of their children come in conflict, we only follow the law in preferring the superior claim of the husband, unless his custody should be inconsistent with the welfare of his children, which is a paramount consideration, and will always regulate the discretion exercised in the disposition of them. The paternal right may be forfeited by an inability or neglect to provide for the child's wants, by a brutal exercise of authority, or by the open practice of those vices which corrupt the infant mind; and we should regard it as a safe exercise of the discretion vested in the Court, to remove from the custody of a father his infant child, where he lived in open adultery and the child would be exposed to the dangerous influences of an abandoned woman, regardless of the nurture and virtuous training which infancy requires, and which none so fitly as a mother can superintend and direct. Conceding Mrs. Robert's fitness for the discharge of the duties arising from the relation of parent and child, we cannot disturb the legal possession of her husband unless she can show his inability to provide for the necessary wants of his child, and to train it up in the way it should go. The objections urged against his custody consist of alleged acts of brutality towards his wife and children, his neglect to provide for them food and clothing, and his infidelity to his wife. After a review of the evidence we do not perceive any sufficient reason for changing the custody of the child. The affidavits submitted in support and denial of the charges alleged against Lucius C. Robert, may induce us to believe that he has not cherished his wife as his duty required, and that many of her reasonable expectations have been sadly disappointed: but there is no satisfactory proof

Charleston, January, 1858.

that can justify the removal of the child, and until that is furnished it must remain where the law has placed it.

The motion is therefore refused, and it is ordered that Lucius C. Robert be discharged from his recognizance.

Motion dismissed.

WARDLAW, WITHERS and WHITNER, JJ., concurred.

Motion dismissed.

Green vs. Fokett.

J. J. GREEN vs. D. A. FOSKETT.

Insolvent Debtor's Act—Trover.

Where pending an action of trover in which bond has been given under the Act for the production of the chattel, the defendant, being under arrest at the suit of another, is discharged under the Insolvent Debtor's Act, the plaintiff in trover may nevertheless proceed with his action to a recovery, for otherwise he could not have the benefit of the bond.

BEFORE WARDLAW, J., AT CHARLESTON, MAY TERM,
1857.

The report of his Honor the presiding Judge, is as follows:

"Trover, in which, under the Act of 1827, the defendant had given bond and security for the production of the chattel sued for to answer the judgment.

"After the commencement of the suit, the defendant, arrested by another creditor, received a discharge under the insolvent debtor's Act.

"The defendant, conceiving that the discharge was necessarily a discharge from all suits pending, moved that proceedings be stayed. The plaintiff urged for objection the trover bond.

"I hesitated, and was inclined to grant the motion; but thought it better that the case should be put into condition for a final determination by a decision of the defendant's motion. The plaintiff obtained a verdict for one hundred and fifty dollars."

The defendant appealed and now renewed his motion, in this Court, and also moved that the verdict be set aside and the case stricken from the docket.

Charleston, January, 1858.

Seymour, for appellant, cited, *Crane vs. Martin*, 4 Rich. 252.

Pressley, contra, cited Act of 1827, 6 Stat. 837; *McLure vs. Vernon*, 2 Hill, 433; 2 Hill, 667; 3 Rich. 143.

The opinion of the Court was delivered by

WITHERS, J. Pending an action of trover, the defendant, at the suit of another suing creditor, obtains a discharge in pursuance of the insolvent debtor's laws, a bond for the forthcoming of the chattel sued for in trover having been given under the trover Act of 1827,—the question is, shall such discharge as an insolvent debtor prevent the plaintiff in trover from prosecuting his action to a recovery?

The Act of Assembly of 1827, in relation to actions of trover, directs the bond, with surety therein required of the defendant, to be conditioned for the forthcoming of the chattel sued for, "to satisfy the plaintiff's judgment, in case he should recover against the defendant, and such specific chattel shall be liable to satisfy the plaintiff's judgment to the exclusion of other creditors."

It is manifest that the plaintiff cannot have the benefit of the bond at all, as against the principal or the surety, unless he should "recover" against the defendant in trover. ("Recover" is the word, and whether a verdict rendered without judgment being entered, may be enough to give the plaintiff the fruits of the bond, is not a point in this cause.)

If we reverse the decision on circuit, and thus estop this plaintiff from obtaining a recovery, we render the Act of 1827 wholly nugatory in that precise class of cases to which its remedy was meant to apply. It is not matter of any doubt, that a security for the production of a plaintiff's chattel was intended, or its value in lieu of it, for the satisfaction of his recovery exclusively, instead of remitting him, as the prior law of trover did, to a perfectly barren judgment

Green vs. Fossitt.

in case of the defendant's insolvency; in which case a plaintiff saw his property, judicially ascertained to be his, appropriated by a prior judgment creditor, or at best assigned as assets wherein he could only partake *pro rata*.

Such a result, constantly occurring and so directly in conflict with the most common and obvious rule of right, led to the remedial legislation of 1827. We must not forget the duty of administering the whole statute law that may bear upon a case or a question, where any sensible construction may permit it, so as not to destroy the efficacy of one measure by causing that of another to override it.

Looking at the general object and scope of the insolvent debtor's law of 1759, it appears to have aimed at the relief of poor and insolvent "prisoners" for "debt," and those in jail bounds were afterwards placed in that class. If we were to confine our view of those who are the beneficiaries of this Act, to such as were "debtors," and those against whom the relief is granted, to such as are "creditors," according to the plainest interpretation of those terms; and if we add to this the consideration, that a distribution of the insolvent's assigned assets is to be among those who are suing creditors and such others also as may come in within twelve months after the discharge and render "an exact account on oath of the several debts and demands to them owing," (which is a scheme of the Act,) we should exclude from the purview of the Act all actions of tort where uncertain and unascertained damages are sought; for a plaintiff in such an action, pending, would not be a suitor in character of "creditor," such a demand would not yet be a "debt," it would not be capable of rendition to the assignee in the shape of "an exact account upon oath," or if it should be so rendered the "demand" would be of just such amount as a plaintiff or other applicant might think proper to state and ratify by oath. But there is a difficulty in the way of holding that "demands" in the nature of damages claimed for torts alleged, whether prose-

Charleston, January, 1858.

cuted by action or not, are not such as a defendant may be discharged from, or from suits therefor; since the enacting clause of the Act extends its provisions to "any person or persons whatsoever, hereafter sued, impleaded, or arrested, for any debt, duty, demand, cause or thing whatsoever, (except for such matters, causes or things as are hereinafter excepted.)" Persons sued for any and every such cause are to be discharged, it seems, by the terms of the law, except as therein excepted; and yet it will occur to any mind, that it is not practicable to afford justice to those who are seeking the recovery of specific property, real or personal, or damages in lieu of it, (as, for example, in actions to try title to land or trover for a chattel,) if by operation of the insolvent laws, applied *pendente lite*, the defendant is to be released, and still the plaintiff be cut off from all participation in the assets assigned.

However the matter suggested might be decided, if it were necessary, or may be if it ever becomes so, there is a sufficient reason to say that the action of trover, brought under the Act of 1827, shall be allowed to proceed to a recovery, notwithstanding the discharge of the defendant as insolvent, while the action is pending. Otherwise the Act of 1827 really becomes nugatory, and this must not be permitted. This action is to try the title to a horse; the plaintiff has a conditional lien on the chattel, to become absolute and exclusive upon a recovery, and upon that alone. How shall he have this legal right, unless he be permitted to proceed to recovery? If the horse were included in the schedule (and it is said he is not, though we are uninformed as to this) yet, the plaintiff has not reached a point where he can assert his title and seize. If the horse be not included in the schedule, the plaintiff and all others are deprived of so much as assets, even if the plaintiff could come in and present "an exact account on oath" of his "demand." This might be a very disagreeable mode to other creditors to enlarge the basis of

Green vs. Foskett.

dividends, for if suitors in actions of tort are to advance principal sums on their own estimates, upon oath even, as the subjects for dividends, claims may be recognized that may have no foundation in law or fact, and the dividends of *bona fide* "creditors," in the clear sense, those upon note, account, or other contract, and those upon judgment, may be grievously attenuated. If, again, the horse in the present case be included in the schedule, rendered by the defendant, and the plaintiff in the pending action can come in for dividends, (his claim on oath being substituted for a recovery,) he will have to share the value of the horse, his own exclusive property, with others, and treat what is wholly his own as of the assets of one who never had a particle of right to it. Nor can this plaintiff secure his rights by virtue of the provision of the Act of 1759, permitting the proof of mortgages and trust deeds, for the bond in trover *pendente lite*, cannot be thus enforced, as is plain from the terms of it and from what has been already said.

From the case of *Crane & Martin*, 4 Rich. 251, we derive little aid. The defendant there took his discharge in the very case, and it was on a liquidated demand, for judgment was obtained by default. From such a suit, pending or in judgment, the defendant was clearly discharged. The question, on motion to set it aside, was, whether the defendant could have estopped the plaintiff otherwise than by pleading his discharge *puis darrein continuance*. It was ruled he could set aside the judgment on motion, notwithstanding he had not resorted to such means of defence.

We are satisfied, therefore, the decision on circuit was agreeable to justice and according to law, and the motion is consequently dismissed.

WARDLAW, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

Charleston, January, 1858.

WARDLAW, WALKER & BURNSIDES *vs.* THE SOUTH CAROLINA RAILROAD COMPANY.

GARDELLE & DELAIGLE *vs.* THE SAME.

Bailment—Carriers—Warehousemen—Negligence.

Where a railroad company, after transporting cotton as carriers, unloaded their cars and deposited the cotton in their yard, where it was burnt the next evening, the company, without proof as to how the fire occurred, were *held* liable, the jury having found them so, under instructions which regarded them as warehousemen and liable only for negligence. Instructions to the jury to the effect, that it was right to require the Company to show how the fire occurred, and that in the absence of such proof the jury might well hold them liable, *held*, proper.

BEFORE O'NEALL, J., AT CHARLESTON, SPRING TERM,
1856.

The report of his Honor, the presiding Judge, is as follows :

"These were actions for the recovery of losses sustained by the plaintiffs in the burning of cotton in the defendant's yard.

"The receipts given by the defendant, as a common carrier, limited the liability of the Company to the unloading of the cotton from the cars. The cotton in these cases was unloaded and placed on skids in the Company's yard. It was burned on the evening of the day after it was unloaded. How the fire occurred, did not appear.

"There was some proof in one of the cases by a drayman, that he called for the cotton, and was told there was none *there*, when in point of fact it had arrived; in consequence of this there was a delay in taking it away.

Wardlaw, Walker & Burnsidess vs. Railroad Company.

“In Wardlaw, Walker and Burnsidess’ case, there was no doubt the defendant was liable for three bales of the value of one hundred and thirteen dollars and ten cents unaccounted for. So in both cases, it was liable for the cotton partially burned and injured, and which the Company sold, and of which no account was given.

“I thought, and so instructed the jury, that the defendant was not necessarily liable for the cotton burned as a common carrier. The liability was limited to the unloading of the cars. If this was delayed unnecessarily, and the loss thereby resulted, then the Company might be liable. After unloading, they were bound, as warehousemen, to take as much care of the plaintiffs’ cotton as a prudent man would do of his own. That it was right to require the Company to show how the fire occurred; in the absence of such proof, it might be that the jury would think them liable. In all events, they were liable in Wardlaw, Walker and Burnsidess’ case for the three bales unaccounted for, and in both cases for the partially burnt cotton.

“The jury found, in each case, the whole loss.”

The defendants appealed, and now moved this Court for a new trial, on the ground:

That the loss of which plaintiffs complain, was the destruction of their cotton by fire on the platform of the railroad depot, for which loss the defendants were liable only as warehousemen; because the parties had entered into a special agreement, by virtue of the receipts given by the defendants. That as warehousemen, the defendants were only liable for neglect, but no neglect was proved—and so the verdict was without evidence, and contrary to the law as delivered to them by the judge.

Pettigrew, Petigru, for appellant, cited Story on Bail. § 213,

Charleston, January, 1858.

410, 454; 9 Wend. 271; 3 Taunt. 264; 5 B. & C. 322; 1 Cowen, 109; 7 Humph. 334; 3 Camp. 6, note; 13 Johns. 211; Jones on Bail. 124 note, 40; 13 Barb. 488; 1 Bail. 358.

Dukes, De Saussure, contra, cited 2 Kent, 604; 17 Wend. 305; 33 Eng. C. L. R. 364; 5 Durn. & E. 389; 42 Eng. C. L. R. 360; 1 T. R. 27; 3 Wilson, 429; 1 Parsons on Con. 657; Ang. on Car. 287, 289, 292; Story on Bail. § 542; 62 Eng. C. L. R. 859; 14 Geo. R. 281.

The opinion of the Court was delivered by

WHITNER, J. The defendant in these cases claims to have acted in the double capacity of carrier and warehouseman, and herein to have completed the contract for carriage.

It is well understood that a material distinction exists as to the extent of liability according to the character of the bailee, and though the services may be rendered by the same person or company, the contracts should not be confounded. This distinction, where loss occurs, often involves matter of great nicety. The question of delivery as between different persons has its perplexities and these are greatly increased in the class of cases now under consideration. Hence mainly the wide range of the argument, and though we acknowledge the learning and research which have been brought to our aid, it is not perceived that the force of authority could be given, by any solution, if attempted, to some of the questions discussed.

The duration of the carrier's strict liability after the period of arrival at the place of destination, the implied obligation of notice to the consignee in some form or other, or matter of excuse for such default, the thing to be done before a change of responsibility attaches with the general policy which should permit or forbid what is claimed or denied, it

Wardlaw, Walker & Burnside vs. Railroad Company.

is conceded are grave questions deserving careful examination. The large amount of goods carried by railroads, the peculiar circumstances attending their shipment, the various points of destination and hours of arrival by day and night, and remoteness of the consignee or owner from the line or terminus of the road, all combine to make it convenient and necessary as well for the railroad companies, as for the owners of goods, that well defined rules be adopted discharging the carrier from his extraordinary liability as insurer, when the reason no longer exists, and yet holding him to a just measure of responsibility for the protection of the owner, according to the circumstances.

In this case it is said the company had performed their service according to their contract, that they had transported the goods in safety and unloaded them from the cars at the place of destination, and though loss subsequently occurred, the defendant was not liable as carrier. This was conceded by the circuit judge with the single qualification that "if the unloading was delayed unnecessarily, and the loss thereby resulted, that then the company might be liable." Though the verdict was against the company, yet the grounds of appeal suggest no objection to this instruction, and it is manifest that the case did not in anywise turn on this question.—The defendant was remitted to the more favorable position of a warehouseman, and held to such care as a prudent man would take of his own goods. The point presented in the ground of appeal is, "That as warehousemen the defendants were only liable for neglect, but no neglect was proved; and so the verdict was without evidence and contrary to the law as delivered by the judge."

The appellant relies on the general doctrine that when a party is bound to ordinary care before he is made chargeable there must be evidence of neglect or want of care.

In Story on Bail. Sec. 454, it is said "In respect to depositories for hire there seems to be some discrepancies in the

Charleston, January, 1858.

authorities whether the *onus probandi* of negligence lies on the plaintiff or of exculpation on the defendant in a suit brought for the loss." The weight of authority, the eminent writer concludes, is in favor of the former rule, and it is not proposed now to controvert this position. Text writers and judges all agree however, that negligence and diligence are not to be defined by rules of evidence. What should be deemed reasonable care in any case must depend on the peculiar circumstances of that particular case. Precautions which might be deemed reasonable in some circumstances, might not be so in others. Illustrations readily suggest themselves and certainly need not be stated.

In this case the goods were lost, and defendant having shown the loss to have been occasioned by fire, insists that this fact was sufficient to discharge from liability, unless plaintiff should show by direct proof that the fire was the result of negligence. On the contrary, the presiding judge in his instructions said, "it was right to require the company to show how the fire occurred; in the absence of such proof it might be that the jury would think them liable." The question of negligence was of course submitted to the jury, the facts were before them, the circumstances were peculiar, the suggestion was appropriate, and the presumption was fair and legitimate. That was a liberal concession to the defendant, which held that the custody as carrier had ceased by turning off the cotton from the car to the platform, and that the skids in the yard of the company alongside the track as a place of deposit, entitled to the character and analogies of a warehouse.

Though it may be well claimed that the terms of the contract dispensed with a personal delivery, some future case may settle the question raised in the argument, whether it also dispensed with notice of arrival.

This *quasi* warehouse at least as a place of deposit, did not afford the ordinary security to the owners of goods,

Wardlaw, Walker & Burnside vs. Railroad Company.

and if by such delivery it be held that the custody is changed, it is no hard measure to require a diligence commensurable with the particular risk still to be incurred. Again, it is manifest that under such circumstances, care should be taken that the bailor is not placed entirely at the mercy of the bailee, when loss ensues.

The omission to prove, what a party should at all times be prepared to establish, may well raise a presumption often against him.

The place where this loss occurred was in the yard of the company, and surrounded by their employees, who were at all times under their control and within their knowledge. Such witnesses would generally be unknown to the owners or consignees, and but little disposed to implicate themselves in a charge of negligence. In reference to such an inquiry as the one on foot in this case, ordinarily proof by one of the parties, would be easy and proper, by the other impracticable and uncertain. Hence the rules to be found in our books under such circumstances. In this State the rule on the subject of limiting the liability of a carrier has been relaxed though the *onus* still rests to bring himself within the exceptions and to discharge himself of negligence. *Swindler vs. Hillard & Brooks*, 2 Rich. 303; *Singleton vs. Hillard & Brooks*, 1 Strob. 214. So too in case of loss by the killing of cattle, a *prima facie* case is made by the killing, which devolves on the company the *onus* of explanation or excuse.

The standard of diligence in such a case as this would imply the presence of employees acting as watchmen or otherwise, who should be able to speak, and silence of defendant became an element in the inquiry.

The motion for a new trial is dismissed.

O'NEALL, WARDLAW, WITHERS and MUNRO, JJ., concurred.

Motion dismissed.

Charleston, January 1858.

THE CITY COUNCIL OF CHARLESTON *vs.* ALBERT SCHMIDT.*Practice—Process—Teste—City Council—License
Penalty—Release.*

Process in the City Court of Charleston, may bear test before the accrual of the cause of action.

A license granted by the City Council of Charleston after suit commenced for a penalty, is by an ordinance no release of the penalty, although the license by its terms, takes effect from a day previous to the commission of the offence, and covers the date of the offence.

In the City Court of Charleston.

The report of his Honor, the recorder is as follows :

“This was an action within the summary process, jurisdiction for one hundred dollars, being the penalty imposed by the city ordinance for selling liquor without license. (City Ord., p. 230.) When the case was called, it was moved by the defendant's attorney that the process be quashed as the copy process served on defendant was tested on the 19th of April, 1856, when the offence was alleged to have been committed on the ourth day of May, 1856.(a) I did not consider the objection well founded, and overruled the motion. A witness was then called who testified to the fact of the retailing by defendant on the fourth day of May, as alleged in the process. The defendant then offered in evidence and proved a license from the City Council to retail from the 1st of April, 1856, to 1st April, 1857, which period embraced the time of alleged offence, and the same was pleaded as a release by the City Council.(b) I considered this a matter of construction, and that the City Council had avoided such construction by

(a) The process was lodged, the 20th May, 1856.

(b) The license was dated the 31st of July, 1856.

City Council vs. Schmidt.

the XXV section of the Act of 1836, (City Ord., p. 224,) which provided, "that after any suit shall have been commenced for the penalty for selling without a license, no person shall be permitted to take out a license without paying such penalty. And should such license be granted, the penalty shall not thereby be remitted." I ruled, therefore, that the penalty was not released by the fact of the license, and the case having been submitted, the jury found a verdict for one hundred dollars, the amount of the penalty."

The defendant appealed, and now moved this Court, to set aside the verdict on the grounds:

1. Because the copy process served on defendant was tested on a day prior to the day when the offence was charged to have been committed, the same having been tested on the 19th of April, and the offence charged as committed on the 4th of May in the same year.

2. Because the defendant showed and proved a license from the City Council to retail from the 1st April, 1856, to the 1st April, 1857, which period embraced the date of the offence charged.

Pope, for appellant. On the 1st ground.—The cause of action must accrue prior to the test of the process. 1 Ch. Pl. 260. The judgment therefore should be arrested. 2d ground.—The license embraces the time when the retailing took place, and was a release or waiver by the City Council. *City Council vs. Corlies*, 2 Bail. 189.

The XXV. section of the Ordinance of 1836 cannot affect the release. The waiver or release is the legal consequence of the license. Council is therefore estopped and cannot show a different intention. *State vs. Bank of Charleston*, Bank case, 512.

Charleston, January, 1858.

Porter, contra, cited 7 Stat. 294; 11 Stat. 238; 2 Burr. 962; City Ord. 219.

The opinion of the Court was delivered by

WHITNER, J. The recovery of the penalty under an ordinance of Council is resisted in this case on the ground, that the process issued before the offence was committed. The commencement of the suit is alleged to have been at the date of the test of the process. In this particular there is no difference in form or effect between process issued from the City Court and the Court of Common Pleas in this State. Act of Assembly, 1842, 11 Stat. 248. Without recurring to previous legislation, since the Act of Assembly, 1825, (7 Stat. 330,) writs and process are issued from the Court of Sessions and Common Pleas, bearing test on any day previous to the day on which they are made returnable. If the ground taken was well founded, it would prove that more perhaps than half the process issued since 1825, and more than nine-tenths previously, when the test was from preceding term, would have been obnoxious to the objection, at least since the day in 2 Burr. 962; and perhaps for a century before: the test is regarded as mere matter of form and the commencement of the suit is dated from the lodgement of the process. In this instance we are informed, though not stated in the brief, the process was lodged in sheriff's office, 20th May, 1856, and the offence was committed 4th May, 1856.

The second ground rests upon an alleged release or waiver of the penalty by the license granted in July, 1856, covering the period which intervened from the 1st of April 1856, to 1st April next ensuing. The ground is well taken under the authority of the case, *City Council vs. Corlies*, 2 Bail. 189; unless avoided by the ordinance of 1836, Sec. 25, (Cit. Ord. 224,) which has been adopted since the decision of the case

City Councils vs. Schmidt.

in Bailey. By that ordinance it is provided "that after any suit shall have been commenced for the penalty for selling without a license, no person shall be permitted to take out a license without paying such penalty, and should such license be granted the *penalty shall not thereby be remitted.*" We think the cause presented is precisely as though this part of the ordinance had been incorporated in the license. We concur therefore with the Recorder in the view that the *presumption* of a release could not arise in the face of an express declaration to the contrary, and constituting a term of the contract itself and doubtless well understood by the defendant. The course of proceeding indicated by the form of such licenses, referring to a day passed, has many objections, at least in the judgment of some members of the Court. A further examination however is not now called for. The motion to set aside the verdict is dismissed.

WARDLAW, WITHERS and MUNRO, JJ., concurred.

Motion dismissed.

Charleston, January, 1858.

MOSES E. BARBOUR vs. ROBERT DISHER, ET AL.

Frauds, Statute of—Contract.

A verbal agreement to deliver one hundred and twenty-five head of beef cattle, at five cents per pound, to be driven from Florida to Charleston, is within the 17th section of the Statute of Frauds. -

BEFORE WARDLAW, J. AT CHARLESTON, MAY
TERM, 1857.

The report of his Honor, the presiding Judge, is as follows:

“Assumpsit to recover damages for the refusal of defendants to receive and pay for cattle according to contract.

“It appeared that the plaintiff, a cattle driver, who resides in Florida, being in Charleston in the summer of 1854, made a verbal agreement with defendants, butchers in Charleston, under which he was to deliver to them one hundred and twenty-five head of beef cattle, to be driven from Florida, and delivered on or before 24th November, 1854, in good condition, and they were to receive the cattle and pay for them, at the rate of five cents a pound:—that the plaintiff tendered the cattle in time, and the defendants refused to receive them, objecting to the condition:—that the cattle were in reasonably good condition, but the market was glutted and the price of beef low.

“The defendants moved for a non-suit, on the ground that there being no writing, the agreement was void, under the 17th section of the Statute of Frauds.

“After argument, I granted the motion for non-suit.”

The plaintiff appealed, and now moved this Court to set aside the non-suit on the grounds:

Barbour vs. Disber.

1. That the contract declared upon was valid, and not void as being within the Statute of Frauds, as it depended upon a contingency, which may or may not have happened within a year, and hence no writing was necessary.

2. That those cases are not within the Statute of Frauds, wherein some thing is required to be done in order to put the thing sold into the state or condition in which it was contracted to be sold, or to render it capable of delivery.

3. That the ruling of His Honor that the contract declared upon was void, as being within the 17th section of the Statute of Frauds, is error and contrary to law.

Rutledge, Whaley, for appellant, cited, 1 Rich. 201; Roberts on Frauds, 173; 1 McM. 91; Story on Sales, § 262; 4 Bur. 2101; 6 East. 606; 3 M & S. 178.

Magrath, Wilkinson, contra, cited, 5 B. & Al. 855; Story on Con. 307, n. 3; 2 Stat. 525; 2 H. Bl. 43; Stra. 506; 7 Taun. 111.

The opinion of the Court was delivered by

WHITNER, J. The motion for non-suit granted on circuit, I apprehend, was a hard measure on the plaintiff in the case made. He seems in good faith, at much inconvenience, to have proceeded in carrying out on his part, the contract into which he had entered. He had the misfortune to encounter a falling market at the time of delivery, and on the trial of the case, the defendants present an objection more embarrassing to plaintiff's recovery doubtless than that raised when the cattle were offered for acceptance.

In the contract set up, an essential element is wanting to render it binding on the parties. There was neither an accep-

Charleston, January, 1858.

tance by the buyer of part of the goods sold, nor earnest given to bind the bargain, nor note or memorandum made and signed by the parties. The 17th section of Statute of Frauds provides, that "no contract for the sale of goods, wares and merchandize for the full price of ten pounds, or upwards, shall be allowed to be good," without one or the other of these ingredients.

It has been held in this State and elsewhere, that where goods are to be made, or something is to be done to put them in a condition to be delivered according to the terms of the contract, it is not within the Statute of Frauds. 1 McM. Eq. 91.

The appellant's second ground of appeal urges this distinction by way of objection to the decision on circuit, but the evidence furnishes no such element in this contract. From its very terms it is manifest there was no change stipulated for, or contemplated in the condition of the thing contracted, and still more foreign was any idea that the cattle were not then in existence. The mere transportation of the article from one place to another, though afterwards effected for the purpose of delivery, does not obviate the objection taken to the contract under consideration. This point was considered in a recent case, *Winship & Co. vs. Buzzard*, 9 Rich. 103. A gin, the subject of contract in that case, was sent from Atlanta, Georgia, to Newberry C. H., in this State for delivery, and yet that fact in no way helped the plaintiff. The doctrine was there recognized in accordance with previous adjudications, that "sales of things which exist *in solido* at the time of sale, although the contract be executory, and the goods to be delivered at a different place, are within the Statute." Though the case above cited was sent back, it was because the evidence on the point whether in fact, work and labor were to be bestowed on the gin itself after the sale and before delivery, was inconclusive, yet the principles here maintained were fully recognized. I may add as a further history of the case

Barbour vs. Disher.

that upon a second hearing, the plaintiffs having failed to supply the evidence, they again failed to establish their right to recover. It is insisted, these distinctions are refined and calculated to mislead; they are nevertheless too well settled to be now questioned, as was remarked by Spencer, C. J., 18 Johns. 58.

The first ground of appeal need not be considered from what has preceded, and because it has not been alleged that the contract was obnoxious to the 4th section of the Statute.

The motion to set aside the order for non-suit is refused.

WARDLAW, WITHERS, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

CASES AT LAW,
ARGUED AND DETERMINED IN THE
COURT OF APPEALS OF SOUTH CAROLINA,

At Columbia—May, 1858.

JUSTICES PRESENT.

HON. JOHN B. O'NEALL,
" DAVID L. WARDLAW,
" JOSEPH N. WHITNER.

HON. THOMAS W. GLOVER,
" ROBERT MUNRO.

CHARITY HAMILTON, ASSIGNEE, vs. ARTHUR HAMILTON.

Prison Bonds' Act, Discharge under—Estoppel.

A discharge under the prison bounds' Act is a bar to an action on the prison bounds' bond.

BEFORE MUNRO, J. AT MARION, SPRING TERM, 1858.

This was an action of debt on a prison bounds' bond against the defendant as surety of Tristram Hamilton.

Tristram Hamilton had been discharged under the prison bonds Act. The notice was dated 29th September, 1856, and his discharge was on the 8th October, 1856, and the only question was whether sufficient notice had been given. The verdict was for the plaintiff.

Hamilton vs. Hamilton.

The defendant appealed on the ground, *inter alia*, because the Court could not look behind the prisoner's discharge.

Sellers, for appellant, cited *Hibler vs. Hammond*, 2 Strob. 106; *Martin & Walter vs. Stribling*, 2 Sp. 67; *Caldwell vs. Metz*, 2 Sp. 95.

Phillips, contra.

Curia, per O'NEALL, J. In this case, we think the discharge of the prisoner, under the prison bounds' Act concludes the question now attempted to be made. The case of *Hibler vs. Hammond*, 2 Strob. 105, which ruled, that the discharge of a prisoner under the insolvent debtors' Act is a bar to the action, on the prison bounds' bond, is decisive of this.

For the discharge of the Commissioner of Special Bail within his jurisdiction is as much *res judicata* as a discharge by the Court under the insolvent debtors' Act. Neither can be questioned while unreversed.

This decision concludes the plaintiff's rights, and it will be useless to further litigate the matter.

It is therefore ordered that the verdict be set aside and a non-suit granted.

WARDLAW, WHITNER, GLOVER AND MUNRO, JJ., concurred.

Motion granted.

Columbia, May, 1858.

THOMAS D. FRIERSON *vs.* SALONA WESBERRY, EXECUTRIX.*Homestead Act—Executor de son tort.*

A widow for claiming and taking a horse as exempt from levy and sale under the Homestead Act, is not liable as executrix *de son tort* of her husband.

Where a widow claimed and was allowed the benefit of the Homestead Act, as to the land, before the Act was repealed, and then the personal estate of the husband, in her possession, he having no personal representative, was, also before the repeal of the Act, levied on by the sheriff under an execution against the husband, and at the sale after the repeal of the Act, the widow claimed a horse as exempt from levy and sale under the Homestead Act :—*Held*, that the claim was proper, and that the horse was exempt from levy and sale.

BEFORE GLOVER, J., AT SUMTER, SPRING TERM, 1858.

Sum. Pro. against the defendant as executrix of Samuel J. Wesberry, deceased, late husband of the defendant. The cause of action was a promissory note for forty-seven dollars and forty-one cents, given by Samuel J. Wesberry to the plaintiff, bearing date the 5th August 1856. The plaintiff was sheriff of Sumter, and the process was lodged with the coroner on 23d October, 1857. The defendant pleaded *ne unques executrix* and *plene administravit*.

It appeared that the plaintiff as sheriff, on the 11th December, 1857, under an execution lodged on the 9th June, 1856, upon a judgment by confession of E. W. Bonney against Samuel J. Wesberry, for two hundred and twenty dollars, besides interest and costs, had levied on a wagon, horse, cattle, hogs, goats and a buggy, which he found on the plantation of the deceased, and in possession of the defendant. This prop-

Frierson vs. Wesberry. :

erty except the horse was sold at the residence of the deceased, by the plaintiff's deputy, on sale day in February, 1858. The horse was claimed by the defendant under the Homestead Act, and by direction of the plaintiff was not sold by his deputy.

The horse was worth sixty or seventy dollars. It further appeared that the defendant, as widow, had, on the 20th February, 1857, applied to the clerk for the benefit of the Homestead Act, that commissioners had been appointed, who, on the 8th May, 1857, made their return, allotting to her the homestead and fifty acres of land.

His Honor thought that the defendant by claiming and retaining possession of the horse after the repeal of the Homestead Act, had so intermeddled as to make herself liable as executrix in her own wrong, and he decreed for the plaintiff the amount of the note.

The defendant appealed and now moved this Court to reverse the decree on the grounds:

1. Because the decree should have been for the defendant, on the plea of *ne unques executrix*.

2. Because the decree should have been for the defendant on the plea of *plene administravit*.

Spain & Richardson, for appellant, cited 6 Stat. 214; 12 Stat. 85; 12 Stat. 672; *Kinard vs. Moore*, 3 Strob. 193; *Reddish* ads. *Gill & McClure*, MSS. Col. Dec. 1829, 1 Rice Dig. 321; *Givens vs. Higgens*, 4 McC. 286; *Ford vs. Rouse*, Rice, 223; *Caldwell vs. Michau*, 1 Sp. 277.

Blanding, contra.

The opinion of the Court was delivered by

MUNRO, J. It appears that the defendant's husband died

Columbia, May, 1858.

sometime prior to the month of February, 1857, intestate, and that some short time afterwards, she made application to be allowed the benefit of the Homestead Act. That the commissioners appointed pursuant to the provisions of that Act, on the 8th of May following made their return, allotting to her the homestead, and fifty acres of land. On the 11th of December, the sheriff, by virtue of a *fi. fa.* against the defendant's husband, levied upon a horse, which the defendant also claimed under the Homestead Act, so that it is upon this claim which the defendant set up to the horse in question, that the plaintiff now seeks to charge her as an executrix in her own wrong.

Under the recent Act of 1851, the Homestead Act, no formal proceedings were required to be instituted in reference to the chattels that were exempt by its provisions; it was only in relation to the homestead, and the fifty acres of land, that formal proceedings were rendered necessary. The defendant having been in possession of the horse from the death of her husband, it is fair to presume, that she claimed it under the Act of 1851, at the same time that she instituted proceedings in relation to the land. But assuming that she delayed to assert her right up to the time of the levy by the sheriff, this could by no means affect her right to do so, provided it was done prior to the repeal of the Act. It is therefore manifest that the defendant's title to the horse in question under the Act of 1851, was as completely vested in her, as was her title to the homestead, and the subsequent repeal of the Act, could no more affect her title in the one case, than it could in the other.

The motion to reverse the circuit decision is therefore granted.

O'NEALL, WARDLAW AND WHITNER, JJ., concurred.

Motion granted.

State vs. Caspary.

THE STATE vs. AARON CASPARY.

Bastardy—Indictment.

Good spellers in South Carolina

An indictment for bastardy, alleging that A. C. "is the *farther* of the said bastard child:"—*Held*, bad, on motion in arrest of judgment.

BEFORE WARDLAW, J., AT ANDERSON, SPRING TERM,
1858.

This was an indictment for bastardy. A printed form was used which, after alleging the birth of the child, &c., proceeded as follows: "And the jurors aforesaid, upon their oaths aforesaid, do further present, that one Aaron Caspary is the *farther* of the said bastard child, and has refused to enter into recognizance," &c. The defendant was found guilty. He appealed, and now moved this Court in arrest of judgment, on the ground, that the defendant was not legally charged with being the *father* of the bastard child, the use of the word *farther* rendering the sense obscure and uncertain.

Wilkes, for appellant, cited Act of 1839, §12, 11 Stat. 16; *Republica vs. Tryer*, 3 Yeates, 451; 5 Bac. Abr. 90. The words of the statute would be pursued with the utmost exactness; *State vs. Petty*, Harp. 59; 2 Hill, 459; *State vs. Butler & Quin*, 3 McC. 383; and the defendant must be brought within all the material words, and nothing can be taken by intendment. *State vs. O'Bannan*, 1 Bail. 383. Clerical and grammatical errors will not vitiate, unless they change the word or obscure the meaning. *State vs. Wimberly*, 3 McC. 190; *State vs. Holder*, 2 McC. 377; *Commonwealth vs.*

Columbia, May, 1858.

Wentz, 1 Ashmead, 269 ; *State vs. Carter*, Cam. & N. 210 ; 1 Chit. Cr. L. 171, note *e*, 172, 214.

Reed, Solicitor, contra.

The opinion of the Court was delivered by

WARDLAW, J. The tendency of modern decisions has been to efface the blemish which Lord Hale observed in the law, (2 Hale, 193,) occasioned by the strictness required in indictments : but still it is admitted that technical objections, which would be unavailing in civil proceedings, must be allowed in criminal. (1 Leach, 134). Clerical and grammatical errors which do not affect the sense, will be ordinarily disregarded, (3 McC. 193) : but where the omission or addition of a letter makes a change of the word, so as to make another word, it becomes material when it occurs in certain parts of an indictment. If it occurs in setting forth an instrument, according to the tenor, it vitiates, although the sense may not be affected :—as *nor* for *not*, (2 Salk. 660) : whilst *undertood* for *understood*, would even there be disregarded. (Cowp. 229 ; 1 Leach, 145.) If, as in this case, such omission or addition occurs in setting out those material words of a statute, which must be pursued in describing a statutory offence, a want of the necessary certainty is produced, wherever the meaning is obscured. That the defendant is *farther* of a bastard child is perhaps nonsensical, certainly ambiguous :—only by intendment and indulgence not allowed in criminal proceedings, could we say that the meaning is, *he is the father*. It might be different, if the word had been written *faether* ; for that would not be a different word, and would be a provincial corruption of father.

Let the judgment be arrested.

O'NEALL, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion granted.

Ex parte Maffet.

EX PARTE, LEVI B. MAFFET.

Insolvent Debtors' Act—Practice.

Whether a suggestion may be filed contesting an applicant's right to his discharge under the Insolvent Debtors' Act, is a matter within the sound discretion of the Circuit Judge.

The charges of fraud in such case should be clear, distinct and specific and not founded on hearsay and rumor.

BEFORE GLOVER, J., AT NEWBERRY, SPRING TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"The petitioner, one of the firm of L. B. & R. D. Maffett, and who was in custody at the suit of George G. De Watt, executor, applied for the benefit of the Insolvent Debtors' Act. His application was resisted by S. S. Farrar & Brothers. Maffett was sworn and interrogated, who stated that his books were in Mr. Summer's office for inspection; that he did not procure his arrest under the *ca. sa.*, nor was it by his consent; that the last payment which he made on the judgment in favor of Gilliland Howell & Co., was about the 1st July, 1857, and that the payments he made were with no intention to defeat the debts of other creditors; that his firm was closed in 1855, and he commenced as a clerk, for his father in September, 1856, at Frog Level, at a salary of two hundred dollars per annum, or for what his wages were worth, and that he, on one occasion in Charleston, did say that the profits of the present business are for his benefit.

"By order of the presiding judge, his schedule was amended, and his interest in the profits of the present mercantile business at Frog Level was inserted.

"The affidavit of C. D. Farrar, one of the firm of S. S. Farrar & Co., was then offered, stating that he had good

Columbia, May, 1858.

reason to believe, and did believe, that Maffett procured his arrest, and that it was by his own consent; that he made a payment to another creditor for the purpose of defeating the claim of S. S. Farrar & Brothers; that he has threatened to defeat said claim, and that he at one time offered to pay all creditors sixty-six and two-third cents to the dollar; that the assets in the schedule are of small value, and the defendant believes that the schedule does not contain all the choses in action belonging to said Maffett, which he believes an examination of the books of the firm will verify, and which he believes can be proved otherwise.

"The examination of the applicant did not satisfy me that he was guilty of fraud, nor did the affidavit of C. D. Farrar specify, except vaguely, and on general belief, that Maffett's conduct was fraudulent. By his examination, the applicant on oath had denied all the allegations of fraud set forth in the affidavit. As the allegations of fraud would necessarily delay the hearing of the petitioner's application, I suggested to the counsel the production of the affidavits of third persons as to any fraudulent conduct of Maffett, and I would have been satisfied with any affidavit which submitted a stronger allegation of fraud than the one of C. D. Farrar, which had been answered by the petitioner on his examination.

"S. S. Farrar & Brothers proposed to file suggestions alleging fraud, and resisted an order to discharge the prisoner from his arrest, which motion was refused."

S. S. Farrar & Brothers appealed, and now moved this Court to reverse the ruling of his Honor, on the grounds:

1. That he erred (as is respectfully submitted) in refusing to permit the contestants to file suggestions whereby an issue could be made up to try the questions of fact raised by the affidavit of one of the contestants, alleging that the petitioner's schedule did not contain his whole estate; that the petitioner

Ex parte Maffet.

had been arrested by his own consent and procurement, and that he (the petitioner) had made a payment which amounted to an undue preference of a creditor to the contestants.

2. That the contestants had a right to a trial by a jury of the country, when their rights were passed upon, without making the showing required by his Honor, to wit: the affidavit of a disinterested person alleging matter sufficient in law to preclude the petitioner's discharge, when the contestants had no power to produce an affidavit of a disinterested person, or the testimony of such person in any way, unless an issue had been made up.

Baxter, for appellant, cited *Sherman & Debruhl vs. Barret*, 1 McM. 147; *Rosen vs. Moye*, 1 Rich. 64; 3 Strob. 365; *Baker Johnson & Co. vs. Bushnel*, 1 McM. 67; 5 Stat. 80.

Summer, contra, cited *Zylstra's case*, 2 Bay, 147; Act 1836, 6 Stat. 536. The matter is within the sound discretion of the circuit judge and there must be a showing by affidavit, or in some other way.

The opinion of the Court was delivered by

MUNRO, J. This was an application for the benefit of the Insolvent Debtors' Act. The applicant's right to his discharge was resisted by his creditors, whereupon he was examined under oath, in conformity with the provisions of the Act of 1836, touching the fairness of his schedule.

The contestants, not being satisfied with the result of the applicant's examination, persisted in resisting his discharge, and upon the affidavit of one of the contestants, moved for leave to file suggestions of fraud, in order that an issue might be made up, and the matter submitted to a jury.

Columbia, May, 1858.

The motion was refused by the circuit judge, so that his ruling is now charged as error in the grounds of appeal.

The reasons assigned by the circuit judge, for his refusal to sustain the motion, are thus stated in his report: "The examination of the applicant did not satisfy me that he was guilty of fraud; nor did the affidavit of C. C. Farrar, specify, except vaguely, and on general belief, that Maffett's conduct was fraudulent. By his examination the applicant had denied all the allegations of fraud set forth in the affidavit."

Upon the application of a party claiming the benefit of the Insolvent Debtors' Act, if the judge, before whom the application is made is satisfied, either from the personal examination of the applicant, or from any other source, that he has failed to make a full and fair surrender of his estate for the benefit of his creditors; or has in any other particular failed to comply with the requisitions of the law, it is his duty to refuse the application, and leave the matter to be passed upon by a jury, upon suggestions to be filed for that purpose, as was done in the case of *Rosser vs. Moye*, 1 Rich. 62.

But if, on the contrary, he is satisfied that the debtor has made a fair surrender of his estate, it is equally his duty to discharge him.

It is true, that notwithstanding the applicant's examination under oath, and his denial of the various matters alleged in opposition to his discharge, the creditors are not thereby precluded from controverting the truth of his statements, and of submitting the same to the arbitrament of a jury. But it is equally clear, that their right to do so can only be sustained where the charges of fraud are clear, distinct, and specific, and not founded as was the case here, upon mere hearsay and rumor.

Of the sufficiency, however, of the showing to sustain a motion of this kind, and whether its tendency will be to protect the interests of creditors, or on the contrary to hinder or

Ex parte, Maffet.

delay the applicant's discharge, are matters that must necessarily be left to the exercise of a sound discretion on the part of the judge before whom the application is made; with the exercise of which, it would be to say the least of it, unwise for an appellate tribunal to interfere.

Wherefore the motion is dismissed.

O'NEALL, WARDLAW, WHITNER and GLOVER, JJ., concurred.

Motion dismissed.

Columbia, May, 1858.

HENRY CARTER, ADMINISTRATOR, *vs.* CHARNER ESTES.

Costs—Executors and Administrators—Trove.

Where an executor or administrator may sue without mentioning his representative character he is liable for costs.

For a conversion after the death of the intestate, the administrator may sue in trover without naming himself administrator, and he is therefore liable for costs even though he names himself administrator.

BEFORE O'NEALL, J., AT CHESTER, SPRING TERM, 1858.

Trove for the conversion of negroes. The declaration after reciting that the defendant was attached to answer to the plaintiff, administrator of all and singular, the goods and chattels, rights and credits, which were of William Estes, deceased, alleged, that William Estes, in his lifetime, to wit, on, &c., was possessed as of his own property of certain negroes, &c., which on the same day he lost, &c., that afterwards, to wit on, &c., he died, &c., after whose death, to wit, on, &c., the negroes came to the possession of the defendant by finding, who knowing the said negroes to belong to the plaintiff, to whom administration, &c., had been granted, nevertheless converted them to his own use, &c.

The plaintiff having failed in his action his Honor decided that he was liable for costs.

The plaintiff appealed.

Melton, for appellant. An administrator is not liable for costs where he necessarily sues in his representative character. 2 Bac. Abr. 518; 2 Arch. Pr. 146; Hull. on Costs, 175; *Tattersall vs. Groote*, 2 B. & P. 254; Tidd. 978; *Frink vs.*

Carter vs. Estes.

Luyton, 2 Bay, 166; *Jamison vs. Lindsay*, 1 Bail. 79. Where an administrator has only constructive possession he must declare as administrator. *Cockril vs. Kinaston*, 4 T. R. 277; 2 Saund. Pl. & Ev. 870. But plaintiff here did not have even the constructive possession, for that can be only where the intestate was possessed at the time of his death. The case is analogous to cases arising *ex contractu*, where the breach occurred after the intestate's death; *Wilton vs. Hamilton*, 1 B. & P. 445; *Cooke vs. Lucas*, 2 East, 395; *Tattersall vs. Groote*, 2 B. & P. 254; 3 B. & A. 687. The rule, that if an administrator declare on a conversion in his own time, he is subject to costs, rests upon cases of non-suit, with counts, one or more alleging possession in administrator, *Farley vs. Farley*, 2 Bail. 319; *Hollis vs. Smith*, 10 East, 293; *Grimstead vs. Shirley*, 2 Taunt. 116; cases where the administrator alleged possession in himself, *Bollard vs. Spencer*, 7 T. R. 354; and cases where the intestate died in possession, thus giving the administrator constructive possession, 1 Ven. 109. The proper rule to be deduced from these cases is, that if an administrator allege a conversion in his own time, predicated on a possession, actual or constructive in himself, he is liable for costs. If plaintiff is not clearly within the Act he is entitled to his common law exemption. 23 H. 8, c. 15, 2 Stat. 462; 6 Mod. 94; 1 Salk. 208. He further cited *Ketchum vs. Ketchum*, 4 Cow. 88; *Goldthwayt vs. Petrie*, 5 T. R. 235; *Kirby vs. Quin*, Rice, 224.

McAilly and *McLure*, contra.

The opinion of the Court was delivered by

GLOVER, J. The action was trover, brought by the plaintiff as administrator of William Estes, to recover damages for the conversion of certain slaves, alleged to have been in possession of the intestate, in his lifetime, and to have been

Columbia, May, 1858.

converted after his death. The verdict was for the defendant, and O'Neill, J., on circuit having decided that the plaintiff was liable for costs *de bonis propriis*, a motion is made in this Court to reverse the decision on the ground, "that the plaintiff sued in his representative character on a cause of action which arose in the lifetime of his intestate, and he is therefore not liable for defendant's costs."

The rule seems to have been long and well settled, that where an executor or administrator brings an action in which he need not name himself in his representative character, and fail, he shall pay costs, (*Jenkins vs. Plombe*, 6 Mod. 91,) and his naming himself executor or administrator shall not exempt him from it. The same rule has been adopted in South Carolina and has been followed since 1798. (*Frink & Co. ads. Luyton*, 2 Bay. 166; *Jamison vs. Lindsay*, 1 Bail. 79) Our next inquiry is, was the plaintiff bound to sue in his representative character. In *Kerby vs. Quinn*, (Rice. 264,) it was held, that an administrator who has never had possession of the goods of his intestate, may maintain trover in his own name for a conversion after the death of the testator, his letters of administration being the evidence of his title; and in *Farley vs. Farley*, (2 Bail. 319,) the plaintiff having declared in trover for a conversion in the lifetime of his intestate, and in a second count, for a conversion after his death, after a verdict for the defendant it was decided that the plaintiff was liable for the costs on the second count *de bonis propriis*. Where executors or administrators in good faith and with such information as they may reasonably rely upon to establish their rights, commence suits in their representative characters, or in their own names to establish those rights, another rule apparently more just and equitable, may be suggested. We are not prepared however, for the reasons urged, to reverse the judgment of the circuit judge, which conforms to a rule so long settled and acted upon;—and in reply to the argument in support of an alteration of the law in this respect, the

Carter vs. Estes.

language of Lord Kenyon is appropriate. "The rule in favor of executors and administrators is sufficiently extensive. We all of us remember actions improperly brought by them and which, perhaps, would not have been brought had it not been for the privilege they have of being exempt from paying costs." Without some salutary restraint the assets of an estate may be considerably wasted by the legal representative in fruitless litigation.

Motion dismissed.

O'NEALL, WARDLAW, WHITNER and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, May, 1858.

DAVID S. RAIFORD *vs.* WILLIAM A. FRENCH.*Evidence—Declarations of Agent.*

The declarations of an agent must be contemporaneous with the act done, or they are inadmissible as evidence.

B's wife was the daughter of A, and A's wife carried to B's house a negro boy, where she left him, and he remained in B's possession near three years. In trover by A against B for the conversion of the negro boy, the declarations of A's wife, when carrying the negro boy to B's house, were *held* inadmissible as evidence against B, to rebut the presumption of a gift arising from his possession.

The declarations of B's wife made several months after his possession commenced, also *held* inadmissible against him.

BEFORE WARDLAW, J., AT LAURENS, SPRING TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"Trover for a negro boy, Mason, now about eleven years old.

"The defendant married Ann, daughter of the plaintiff, January 29, 1850. Dr. Jacks had, a few months before, married Sarah, another daughter. The plaintiff lived near the Newberry line; the defendant's father on Saluda, thirty miles off. The defendant took his wife to his father's, and she staid there until November, 1850, when she went to her father's to lie in. The plaintiff gave nothing to either daughter before January, 1851. Then in a book which he kept, Mrs. Jacks entered the gift to herself of a negro woman, Lodoiska, a horse, and some furniture; and in like manner, Mrs. French entered a gift to herself in these words: "Jan. 1, 1851. I give to Ann French a negro woman, Madeline, worth eight hundred and twenty dollars; a horse, Charley,

Relford vs. French.

one hundred and twenty-five dollars; saddle and bridle, fifteen dollars; bed, twenty-five dollars; chairs, &c., twenty-four dollars; crockery, &c." Mrs. Jacks took Lodoiska, and with her a small girl, Alice, about five years old. Mrs. Jacks died in 1855, and Dr. Jacks yielded to the demand of the plaintiff, who, acknowledging the gift of Lodoiska, demanded Alice that had been in the possession of Dr. Jacks until his wife's death.

"Mrs. French returned to her husband's father's in January, 1851, and with her went Madeline and a small boy, Albert, then five or six years old. Soon afterwards, she and her husband removed to a house of their own, near his father's. In December, 1851, Albert was taken back to the plaintiff's, (some fault having been found with him, as the defendant's father testified.) In 1852, a small girl, Louisa, the property of W. Shelton, uncle of Mrs. French, was at the defendant's. She was taken back; and in February or March, 1853, Mason, then about three years younger than Albert, was taken by the wife of the plaintiff and left at the defendant's. In May, 1853, Mrs. French had her second living child, but Mason did not nurse. In September, 1853, Mrs. French and her children went to her father's, and there she remained during the absence of her husband, who went to Philadelphia in October, 1853, to attend medical lectures, and returned in January, 1854. All this time, Madeline with her male child, which was born in 1851, and Mason, remained at the place of the defendant's father—the defendant's own plantation having been sold in the fall of 1853, and all his household goods removed to his father's.

"In January, 1854, defendant and his wife went to his father's; there they staid until November, 1855, when they moved to a new place hard by. She died December 17, 1855—immediately afterwards the plaintiff demanded Mason, and upon the defendant's refusal to deliver him, this suit was brought.

Columbia, May, 1858.

"Some conversations of the plaintiff were in testimony: In August, 1853, he said to the defendant's father that he was displeased with defendant for sending home Albert, who might then have been useful, whereas Mason was not fit for any use. In December, 1853, he spoke of *Arnold's* (defendant's) *negroes* visiting his; and *two or three years ago*, he in an excited conversation said, in presence of Dr. Pressly, "If French had done as much for his son (and he has but one), as I have done for my daughter, they would have a pretty good start. I have given her furniture, a negro boy, and a negro woman that had a child, or was like to have one, and a d——d good race horse."

"The plaintiff offered declarations of Mrs. Raiford, plaintiff's wife, made to an acquaintance on her way when she took Mason to defendant's, and made to friends after her return; and he offered, also, declarations of the defendant's wife, made during his absence in Philadelphia. These I excluded—but I permitted free inquiry as to all declarations made by the defendant's wife before the defendant acquired possession, and as to all declarations contemporaneous with the delivery to him, or so connected with it as to be part of the *res gestæ*, or to afford any explanation of equivocal circumstances.

"In my instructions to the jury, I spoke of the presumption which arose from property passing, without explanation, into the possession of a married child; and said that the presumption when the child had been long married, was the same in kind as when the marriage was recent, although in the former case it was feebler in degree. In all cases, I held that it might be rebutted by circumstances, as well as by express agreement.

"The jury found for the defendant."

The plaintiff appealed, and now moved this Court for a new trial on the grounds:

Raiford vs. French.

1. The declarations of Mrs. Raiford, who carried the negro, Mason, to the defendant's, (some three years after the defendant had settled,) should have been received to show the reason why she left the negro in the possession of her daughter, the defendant's wife.

2. Because the declarations of Mrs. French (the wife of the defendant), ought to have been received, showing the nature of the possession of herself and the defendant of the negro.

3. Because his Honor charged the jury that the same *rule of law* which presumed a gift when property was permitted to go home with a man's daughter, when they moved and settled, prevailed where property afterwards went into their possession.

Henderson, for appellant, cited 1 N. & McC. 222; Harp. 374; 7 Rich. 57.

Sullivan, contra.

The opinion of the Court was delivered by

GLOVER, J. The argument for a new trial has been confined to the two first grounds of appeal. A conclusive answer to the third will be found in the case of *Luny vs. Lockhart*, (4 McC. 251).

1. It was contended that Mrs. Raiford, the plaintiff's wife, was his special agent when she took Mason to the defendant's house, and that her declarations are admissible as a part of the *res gestæ* and will bind the principal. Admissions by the plaintiff made at any time will generally be received; but the admissions or declarations of his agent must be confined to the act to be performed and while the agency continues. The agency of Mrs. Raiford can only be implied from the fact that

Columbia, May, 1858.

she took Mason to the defendant's house where he has ever since remained, and the implication, therefore, restricts her authority to the single act of carrying. The carrying of Mason is not a circumstance standing in such relation to the alleged gift as will explain its character or constitute a part of the *res gestæ*. What she said to others on the wayside, qualifying what the law on delivery implies to be a gift, is extraneous and inadmissible. In an action for money paid as premium in effecting an insurance for the defendant, W. as the defendant's agent requested an insurance and gave his (W's) own note to the plaintiff, and failed. The plaintiff offered to prove the subsequent declarations of W, that the defendant would pay the debt. This was held inadmissible, because W. was agent to effect a policy, not to bind the defendant. (*Millie vs. Patterson*, 2 Wash. C. C. R. 31). It was enough, perhaps, in this case that the declaration was not contemporaneous. Where the holder of a check went into the bank, and when he came out said he had demanded its payment and it was refused; it was held that the declaration was not admissible to prove a demand which, if made at all, was made in the bank and the conversation was with the witness after he had left the bank and was returning. (*Brown vs. Lusk*, 4 Yerg. 210.) Mrs. Raiford's declarations of what plaintiff said before she left home were at a different time and not connected with the act of carrying which limited her agency, if any could be implied. No certain rule can be laid down, which, when applied to the circumstances, constituting the *res gestæ*, will enable us to determine the admissibility of declarations. They must have relation to the act to be performed and be contemporaneous with it.

2. When the plaintiff sent Mason to his daughter, the law implied a gift, and the declarations of the defendant's wife, made during his absence in Philadelphia and more than six months after his possession commenced, were clearly inadmissible. The rights of the defendant under the implication

Raiford vs. French.

of a gift, had already attached, and what his wife afterwards and in his absence said was properly excluded. In this respect the principal case differs from the case of *Lark vs. Cunningham*, (7 Rich. 57). There the admissions of the wife were contemporaneous with the act and before any rights had attached.

Motion dismissed.

WARDLAW, WHITNER and MUNRO, JJ., concurred.

O'NEALL, J., dissenting. I dissent. I think Mrs. Raiford's declarations when she was taking home the slave were competent, and ought to have been received.

Motion dismissed.

Columbia, May, 1858.

IRA M. HARREL vs. SAMUEL D. PETTY.

Discount—Judgment—Assignment.

In an action against A he cannot set up as discount a judgment recovered in the name of B for the use of A.

A judgment must be assigned in writing or the beneficial owner cannot sue upon it in his own name or plead it in discount.

BEFORE MUNRO, J., AT DARLINGTON, SPRING TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"This was a summary process on a note payable to one W. L. Morse or bearer, and transferred to the plaintiff after it became due.

"The defendant offered in discount, a judgment rendered in the summary process jurisdiction, on a non-negotiable note, executed by the said W. L. Morse in favor of Leitch & Carrington, and by them transferred to the defendant Petty without a written assignment, and suit brought thereon in the name of the payees, to the use of said Petty. W. L. Morse's insolvency was fully established.

"I rejected the discount."

The defendant appealed, and now moved this Court for a new trial.

1. Because his Honor held that the defendant's demand against the payee of the note, was not available, though the note was transferred to plaintiff after its maturity.

2. Because his Honor held that the discount offered by

Harrell vs. Petty.

the defendant was not a *legal* demand and could not *therefore* avail him, even in the summary process jurisdiction.

Spain, Norwood, for appellant. Plaintiff had notice of judgment of *Leitch & Carrington vs. Morse*, and of course that Petty was in fact the owner of said judgment. The note was not negotiable, yet the judgment thereon was assigned to defendant on its face. Morse owed the money. To whom but defendant? Who else could receipt for it? He is insolvent. The transfer to plaintiff is a fraud and ought not to be sustained. *Tibbetts vs. Weaver*, 5 Strob. 144; *Jeffs vs. Wood*, 2 P. Wms. 129; *Sexton vs. Gee*, 1 Hill 378. *Equities* are regarded. How else could the drawer of a note payable to bearer transferred after due avail himself of discount against the payee, action being in the name of the legal owner and other than the payee? Sec. 2, Discount Act, 4 Stat. 76.

Moses, contra.

The opinion of the Court was delivered by

WHITNER, J. A discount is in the nature of a cross-action in which the defendant is the actor, and by him everything must be proved necessary to maintain his cross-action.

By our Acts of the Legislature, 1798 and 1816, judgments and unnegotiable notes are made assignable so far as to enable the assignee to sue in his own name, which he could not do at common law. *Burton vs. Gibson*, 1 Hill, 56.

Such notes cannot be transferred by delivery only. The assignment must be in writing. *Smith vs. Lyon*, Harp. 334; *Gilchrist vs. Leonard*, 2 Bail. 135. Hence in the latter case a sealed note was not allowed to be set up in discount because not thus assigned: proceeding on the doctrine, that even

Columbia, May, 1858.

though it might be regarded as an equitable assignment, this Court would only take notice of the legal right.

Again, in *Bishop vs. Tucker*, 4 Rich. 178, where one being sued and had possession of a sealed note the discount was not allowed because it had not been actually assigned before the plaintiff's writ issued. The same doctrine must be held in reference to judgments, and appellant's motion must consequently fail. In this case the original suit could only have been maintained in the name of Leitch & Carrington. So too of a second suit upon the judgment, whether as an original or cross-action.

The Court has gone far to sustain the equities of the party to such a proceeding but never so far as now asked. The embarrassments of such a practice are readily suggested.

The motion for a new trial is dismissed.

O'NEALL, WARDLAW, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Jervcy vs. Strauss.

WILLIAM JERVEY, ASSIGNEE OF P. M. COHEN & Co. vs. M.
STRAUSS.

Assignee of Bond or Note—Discount—Evidence.

Where in an action by the assignee of a sealed note, the defendant pleads as discount a demand due him by the obligee before action commenced, the onus is on the plaintiff to show that the note was assigned before the demand was due, otherwise the discount will be allowed.

BEFORE WARDLAW, J., AT ABBEVILLE, SPRING TERM,
1858.

The report of his Honor, the presiding Judge, is as follows:

“Debt on single bill; suit commenced September, 1856.

“The single bill, dated Charleston, November 28th, 1854, for one hundred and ninety-six dollars and ninety-seven cents, was made by the defendant, payable to Dr. P. M. Cohen & Co. at their office; and upon it was written the name *P. M. Cohen & Co.* The plaintiff proved the execution of the bill by defendant, and that the name endorsed on it was in the handwriting of P. M. Cohen, but gave no direct evidence as to the time of the assignment.

“The defendant relied on discounts against P. M. Cohen & Co.

“It appeared that P. M. Cohen & Co., were druggists in Charleston, and that the defendant, a friend and a customer of theirs, was a shopkeeper in Cokesbury, Abbeville District.

“The defendant produced and proved the following papers:

“1st. A bill of exchange for two hundred and twenty-eight dollars and eighty cents, drawn March 29th, 1854, by M. Strauss, at Cokesbury, on P. M. Cohen & Co., Charleston,

Columbia, May, 1858.

payable to the order of Whelan & Co. six months after date :
—accepted by P. M. Cohen & Co., September 9, 1854,
endorsed by Whelan & Co., protested for nonpayment by the
acceptors, October 2, 1854, and paid by M. Strauss, Decem-
ber, 1857.

"2, 3, 4, 5. Four notes made by M. Strauss in Charleston,
for the accommodation of P. M. Cohen & Co., which had
all been negotiated by P. M. Cohen & Co., and they having
failed to meet their endorsements of them, had all returned
to M. Strauss, who paid them since the commencement of this
suit, except about six hundred dollars, which he paid in May,
1856, viz :

" October 7, 1854, payable six months after date, to the order of P. M. Cohen & Co., at the Bank of Hamburg, - - - - -	\$719 53
" December 19, 1854, payable four months after date, to the order of P. M. Cohen & Co., at the Bank of Hamburg, - - - - -	731 59
" February 2, 1855, payable sixty days after date, to the order of P. M. Cohen & Co., at the Bank of the State of South Carolina, - - - - -	650 00
" February 10, 1855, payable sixty days after date, to the order of P. M. Cohen & Co., at the Bank of the State of South Carolina, - - - - -	175 00
	<hr/>
	\$2,276 12

"6. A paper signed by P. M. Cohen & Co., Charleston,
February 26, 1855, certifying that the above mentioned
four notes " were loaned by him (M. Strauss) for our accommo-
dation, and that we are to see them paid out of our assets."

"7. A note made Charleston, February 26, 1855, by P.
VOL. XI.—25

Jervey vs. Strauss.

M. Cohen & Co., for two thousand two hundred and seventy-six dollars and twelve cents, payable one day after date to the order of M. Strauss.

"The plaintiff contended that payments made by Strauss, subsequent to the assignment, upon liabilities previously existing against him, either as drawer of a bill, or maker of an accommodation note, did not constitute discounts against the single bill in the hands of an assignee; that the *onus* of showing the time of assignment, so as to sustain the discount claimed was on the defendant; but that if it was on the plaintiff, the note given by Cohen & Co. in February, 1855, for the whole amount of the accommodation notes, without deduction or notice of the single bill now sued on, which had been previously given by Strauss, raised the presumption that both parties to that note then knew that the single bill was not then in Cohen's hands.

"The defendant insisted that the onus of showing the time of the assignment, from which the plaintiff desired to have advantages superior to those of the original obligees, was on the plaintiff; that such presumption as had been suggested, weak in itself, was wholly rebutted by a consideration of the bill of exchange then outstanding, and other dealings between Strauss and Cohen; that even before payment by Strauss, the accepted bill of exchange and accommodation notes constituted demands against Cohen; that the note of February 26, 1855, was a good discount, and that at any rate the six hundred dollars paid before commencement of the suit was.

"I held that the onus of showing the time of the assignment, if it was claimed to be before the instant which preceded the commencement of the suit, was on the plaintiff; that the bill of exchange and the accommodation notes constituted no discount before payment by Strauss; that the note of February 26, 1855, was plainly intended only as a collateral security for the accommodation, which Strauss had extended by making

Columbia, May, 1858.

the four accommodation notes, and having been given before either of them was due, was without consideration ; but that the six hundred dollars paid constituted a good discount against the single bill, if that had not been assigned before May, 1856. Whether it had been or not, I left to the jury upon the circumstances suggested by the plaintiff as ground for presumption. Much of the debate and of the instructions in the case would have been unnecessary, if it had appeared at the proper stage, that the six hundred dollars had been paid before September, 1856 ; but through some misapprehension, the exact time of that payment (May, 1856,) was not shown until I had nearly concluded my remarks to the jury, when it was by consent shown.

“The jury found for plaintiff the amount of the single bill.”

The defendant appealed and now moved this Court for a new trial, on the grounds :

1. Because the plaintiff, in September, 1856, sued upon a sealed note given by defendant in November, 1854, to P. M. Cohen & Co., and before action brought, or proof of assignment, his discount had certainly accrued against P. M. Cohen & Co., and should have been allowed.

2. Because the plaintiff sued as assignee of a sealed note, and it was necessary for him to prove the time of assignment to himself, and until that at least, (if not until notice to the defendant also appeared,) all demands of the defendant against P. M. Cohen & Co. should have been allowed as a valid discount to the note.

3. Because the plaintiff offered no proof as to the assignment to himself, or notice of it, before the action was brought in September, 1856, when P. M. Cohen & Co. undoubtedly owed him a large amount, which was offered in discount.

Jervey vs. Strauss.

4. Because, it is respectfully submitted, his Honor erred in ruling that the draft in favor of Whelan & Co., accepted by P. M. Cohen & Co., protested for nonpayment by them, and paid by the defendant, the drawer, was not matter of discount against P. M. Cohen and Co.

5. Because, it is respectfully submitted, his Honor erred in ruling that accommodation notes given by defendant to P. M. Cohen & Co., upon which they having endorsed the same, raised money in bank, were not matter of discount against P. M. Cohen & Co., until actually paid by defendant.

6. Because his Honor erred in ruling that a plain promissory note given by P. M. Cohen & Co. to defendant, the consideration of which was money raised upon accommodation notes of defendant, was not a legal and valid demand against P. M. Cohen & Co., and could not prevail as a discount.

7. Because, even under the hard rule of setting aside the above note, yet the accommodation notes themselves were paid by defendant before action brought—before any proof of the assignment, or any notice of the same to the defendant, and should surely have been allowed as a discount.

8. Because the jury was evidently bewildered by the mass of papers, and the verdict for the plaintiff was given in ignorance of the facts and the charge of the Judge, and is utterly without proof to sustain it, and contrary to every principle of law and justice.

McGowan, for appellant. Debts to be set off must be mutually subsisting debts at the time the action is brought. 7 Stat. 169; *Sheppard vs. Turner*, 3 McC., 249. The assignee of a sealed note may bring his action as assignee, but the "obligee is not thereby precluded from any discount, which

Columbia, May, 1858.

he would have been entitled to, if the action had been brought in the name of payee." 5 Stat. 330. From the nature of a sealed note, the original payee remains the legal owner of it, until the assignment is shown. The onus is upon the assignee, both as to the assignment and the time it was made. And it is necessary for him, who claims benefit from it to prove that the assignment was made before the discount accrued; if it is not also necessary to prove notice of the assignment. *Newman vs. Crocker*, 1 Bay, 247; *Brown & Co. vs. Rees*, 2 Tr. Con. R. 498; *Tibbets vs. Weaver*, 5 Strob., 144. The defendant may discount "any accompt, reckoning, demand, cause, matter or thing against the plaintiff," &c., 3 Stat. 611.

Parker, contra. The assignee is legal owner, and no discount after assignment is admissible. *Russell vs. Lithgoe*, 1 Bay 57; *Newman vs. Crocker*, 1 Bay, 246; *Williams vs. Hart*, 2 Hill, 483; *McAlpin vs. Wingard*, 2 Rich. 546; *Thorn vs. Myers*, 5 Strob. 210; 3 Hill, N. Y. 228; 19 Wend. 397; 2 Hill, 140. The onus of showing time of assignment is on defendant, *Cain vs. Spann*, 1 McM. 258; *Ballard vs. McCaskill*, 8 Rich. 90. The accepted bill was not good discount until paid, 6 Rich. 275; *Martin vs. Solomons*, 10 Rich. 583.

The opinion of the Court was delivered by,

WARDLAW, J. If the jury regarded the instructions which were given to them, they must, in finding a verdict for the plaintiff, have proceeded upon the presumption urged in his behalf; that is, they must have inferred that the defendant when he took the note of two thousand two hundred and seventy-six dollars and twelve cents, Feb. 26, 1855, knew of the assignment to the plaintiff of the single bill now in question, because no deduction on account of that bill was then made. A faint presumption of the assignment might arise against Cohen & Co., from their giving the

Jervey vs. Strauss.

note; but against the defendant, under much stronger circumstances, hardly any presumption of knowledge of the assignment could arise from his accepting the note. We choose, however, now to confine ourselves to the fact of the assignment then existing, whether the defendant knew of it or not, and the papers on their face show so plainly what the note was given for, that is both its professed consideration and its real motive, that we would suffer violence to be done to obvious truth, if we admitted that the note and its attending circumstances as they appeared, afforded any evidence at all that the single bill was not then in Cohen's hands.

The verdict upon the fact being then unsupported, the case is resolved into the propriety of the instructions which held the onus of showing the time of the assignment to be on the plaintiff. If the payment of the six hundred dollars in May, 1856, had been shown at the proper time all the questions concerning liability without payment would have been saved, most of the papers which were introduced would have been unnecessary, and a plain debt of the obligees in the single bill to the defendant, due several months before the commencement of the suit having been shown, the question would have been which was prior in time, this debt or the assignment? and upon that question of fact nothing appearing but the assignment without date, the case would have been decided by deciding whose duty it was to show the time of the assignment.

In 1792 it was decided in an action brought upon a bond in the name of the obligee for the benefit of an equitable assignee, that a discount acquired by the obligor after the assignment would not avail. *Newman vs. Crocker*, (1 Bay. 245). The Act of 1798 (5 Stat. 380), turned the right of the assignee of such an instrument as the Act relates to, from an equitable to a legal right, so as to enable him to sue in his own name; but cautiously guarded against any construction which in an action brought by the assignee, would preclude

Columbia, May, 1858.

the defendant from the advantage of any discount or defence which he would have been entitled to, had the action been brought in the name of the obligee or payee of the instrument. If this suit had then been in the name of Cohen & Co. would Strauss have been entitled to discount the six hundred dollars? Yes, certainly, if the discount existed at the commencement of the suit, and nothing more appeared. If an assignee interposed to prevent the discount, upon him would devolve the necessity of showing what would serve his purpose, that is an assignment having higher equity than the discount,—at least an assignment prior in time to a just discount—perhaps also notice to the defendant of the assignment before the defendant acquired the discount. (We choose, however, to reserve all questions concerning notice, and concerning the distinction, if any, between discount and payment.) The Act of 1798 left the rights of the parties in respect to discounts, as it found them. The rights of the defendant depend not upon a proviso of the Act, but upon the pre-existing law, which the Act studiously abstained, in what has the form of a proviso, from interfering with. See *Williams vs. Hart*, 2 Hill, 483. Before the Act a discount availed against the obligee, until the priority of an assignment was shown: since the Act the discount has like advantage against either obligee or assignee until the priority of the assignment be shown; the difference being only, that, in an action by the obligee, the defendant may by force of a discount against the obligee, recover a balance, but in an action by an assignee must be confined to defeating the recovery against himself.

The argument for the plaintiff relies mainly upon the case of *Cain vs. Spann*, 1 McMul. 258. There when a promissory note, payable to bearer, had been in the hands of the original payee almost two years after it was due, and an action upon it was subsequently brought by a bearer, the defendant endeavored to set up in defence a discount against

Jervcy vs. Strauss.

the original payee, acquired soon after the note sued on was proved to have been in the hands of the payee; but the defendant could not prove when the note was transferred by delivery to the bearer, the plaintiff in the suit, and in consequence failed to show that his discount against the payee existed whilst the note remained in the hands of the payee. It was held that the defendant was bound to make out every thing necessary to his defence; that discount was a cross-action; and that the fact of the transfer of the note being subsequent to the acquisition of the discount must be shown by the defendant. A verdict rendered under instructions which did not submit this fact to the jury was sustained.

Of this case it may be observed that it was decided by three judges against two; that no weight seems to have been given to the consideration that the time of transfer was a matter probably known only to the payee and to the bearer, and incapable of proof by the defendant; that the suspicion attending the transfer of a note over due was scarce adverted to, and that a jury might well have concluded that the defendant had shown enough to require some rebutting evidence from the plaintiff. On the other hand it may be observed that a negotiable note does not lose its negotiability when it is over due; that by the English Law, a note transferred when over due, although subject to such equities, arising out of the note or the transactions connected with it, as the payee was subject to, is not subject to a set-off arising out of collateral matter, (*Burrough vs. Moss*, 10 Barn. & Cres. 558,) that the long practice in our State of admitting a set-off against such a note, renders it subject only to such set-off as existed against the original payee at the time of his transfer, (see the well-considered case of *Perry vs. Mays*, 2 Bail. 354;) and that the admission, by way of defence rather than of cross-action, of a set-off, against the payee, in an action by a holder, does not stand upon the provisions of our discount

Columbia, May, 1858.

Act, (1759, 4 Stat. 76,) but only upon its equity. (*McAlpin vs. Wingard*, 2 Rich. 549.)

For our present purpose, it is enough to say that the case of *Cain vs. Spann* related to a promissory note, negotiable by the general law, the bearer of which claimed only the rights which such law gave to him when the transfer was made; but the case in hand relates to a bond, the assignee of which can claim only the right which is given to him by a statute, that expressly reserves the pre-existing right of the defendant to have advantage of all discounts that would have availed against the obligee. This discount would have defeated an action by the obligee brought for his own benefit: if it will not serve to defeat the assignee's action, the reason must be that the assignment was prior to it: the priority of the assignment must then be shown by the assignee, else the *prima facie* sufficiency of the discount will be un rebutted.

The motion is granted.

WHITNER, GLOVER, and MUNRO, JJ., concurred.

O'NEAL, J., dissenting. I dissent. I think the defendant was bound to show that the note was assigned after the discount accrued.

Bivingsville Manuf. Co. vs. Bobo.

THE BIVINGSVILLE COTTON MANUFACTURING COMPANY vs.
S. BOBO.

*Confession of Judgment—Partners—Corporation—
Ratification.*

A judgment confessed by one partner in the name of the firm may be ratified by the other partner so as to make it valid, and the same rule applies to a corporation where the charter makes the corporators liable as partners.

The evidence examined and *held* sufficient to shew the ratification of such a judgment.

BEFORE WARDLAW, J., AT SPARTANBURG, SPRING
TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"At the fall term, 1856, a motion was submitted to set aside a judgment, so far as the Bivingsville Cotton Manufacturing Company was concerned, which had been entered in the case of *Simpson Bobo vs. The Bivingsville Cotton Manufacturing Company and E. C. Leitner*. The motion was refused, and upon the hearing of an appeal from the refusal, an order was made in the Court of Appeals at December term, 1857, in the following words, viz.: 'In this case, the Court think that the facts are not ascertained so as to enable them to pass properly on the motion to set aside the judgment: It is therefore ordered that the case be remanded to the Circuit Court, and that the defendant, or the person moving in that behalf, on entering into a consent rule to be liable for the costs, have leave to make up an issue to try the fact, whether the Bivingsville Cotton Manufacturing Company either con-

Columbia, May, 1868.

fessed the judgment, or, by subsequent ratification, confirmed the judgment confessed by one of the corporators.'

"Upon the suggestion of the Bivingsville Cotton Manufacturing Company, the issue thus directed was made up, and a full trial of it was now had.

"It appeared that various stockholders were, in 1838, (8 Stat. 463,) incorporated under the name of the Bivingsville Cotton Manufacturing Company, and that to the company were given all the usual powers of a corporate body, under the peculiar proviso, 'that nothing herein contained, or hereby provided, shall, in any manner, exempt the said members from all liabilities pertaining to general partners':—

"That the company was organized, and transacted its business through a President, Directors, Agent and Clerk, until 1846, when, by purchase of shares, two brothers, George Leitner and E. C. Leitner, became owners of all the stock, and the only members of the company:

"That on the 15th of April, 1846, articles of agreement between E. C. Leitner and George Leitner were signed and sealed, of which the following is a copy:

"Articles of Agreement between E. C. Leitner and George Leitner.

"This Indenture, made and entered into between E. C. Leitner on the one part and George Leitner on the other, sheweth that the said E. C. Leitner and George Leitner have purchased the property belonging to the Bivingsville Cotton Manufacturing Company, situate on Lawson's Fork in the State and district aforesaid; and that between them it is agreed that they pay for, and own and possess said property in equal proportions, sharing between themselves all the profits, and all the losses or expenses incident or in any wise appertaining to the management and the operation of said property; and it is further agreed upon, that on or before the

Bivingsville Manuf. Co. vs. Bobo.

1st day of next January, the said E. C. Leitner is to take charge of the property, and manage its operations in person, and make out regular quarterly statements exhibiting the true state of the operations of the property, for mutual inspection, and free the said George Leitner from any labor or trouble on account of its management; for which the said E. C. Leitner is to receive as compensation one thousand five hundred dollars per annum, to be paid and charged as expenses upon the establishment, which amount is to be the extent of his compensation until the property is paid for.

“Witness our hands and seals, April 15, 1846.

“E. C. LEITNER, [L.S.]

“GEO. LEITNER. [L.S.]

“The above is a true copy of the agreement in my hands.

“GEO. LEITNER.’

“That on the 1st day of January, 1847, E. C. Leitner took charge of the factory at Bivingsville, and of all the property of the company, and continued to manage the same in person until 1855, when he appointed an agent to manage in his stead:—during all this time, he lived with his family near to or at Bivingsville, and treated the business and property of the company as if they were his own—amongst other things, buying and selling slaves of the company, buying parcels of land which were used in connexion with the large tract of thirteen or fourteen hundred acres on which the factory was situated, erecting new machinery, engaging in new enterprises, intermingling his separate property with that of the company, giving notes in the name of the company, and by word and act holding himself out as the representative of the company with unlimited power:—

“That during the same time, George Leitner resided in Fairfield District, at a considerable distance from Bivingsville, and in the latter portion of the time owned a plantation in

Columbia, May, 1858.

Florida—twice, or oftener, he visited his brother at Bivingsville, but took no control of affairs there, and in conversation said, 'My brother does as he pleases here—the business is under his control, and he manages as he thinks proper:—'

"That in November, 1853, E. C. Leitner, for himself and the Bivingsville Cotton Manufacturing Company, signed the confession of judgment now in question, in favor of Simpson Bobo, from the record of which the following abstract is taken:

"Simpson Bobo vs. The Bivingsville Cotton Manufacturing Company and E. C. Leitner.

"*Writ* in assumpsit, dated January 20, 1854, never entered in the Sheriff's office.

"*Declaration* in assumpsit—Bill of particulars, money had and received, six thousand dollars.

"*Indorsed on declaration*—"We confess judgment to S. Bobo [in] this case for six thousand dollars, and consent that execution issue instanter.

'BIVINGSVILLE COTTON MANUFACTURING COMPANY,

'per E. C. Leitner.

'E. C. LEITNER.'

'Nov. 17, 1853.'

"'This confession is to indemnify S. Bobo in being security for the defendant to Jane Poole for two thousand dollars—to secure plaintiff in the purchase money for the stock in the Bivingsville company, and the stock of D. Dantzler, represented by plaintiff as administrator.

S. BOBO.

'Nov. 17, 1853.'

Judgment signed January 26, 1854.

Fi. fa. lodged the same day.

Bivingsville Manuf. Co. vs. Bobo.

"That in June, 1853, another confession, in like form, was made in the case of *S. Bobo and B. B. Foster vs. The Bivingsville Manufacturing Company and E. C. Leitner*, for fourteen thousand dollars, upon a note, intended to indemnify the plaintiffs against indorsements to be made by them; on which confession, judgment was entered October 7, 1853, and *fi. fa.* lodged March 31, 1855:—

"That E. C. Leitner left the country clandestinely in April, 1855, and soon afterwards George Leitner was at Bivingsville, and then, or shortly before, notes given by him to the company for balances of accounts were in the hands of the agent appointed by E. C. Leitner:—

"That under various writs of *fi. fa.* against the Bivingsville Manufacturing Company, and against E. C. Leitner, the sheriff of Spartanburg district, in July, 1855, December, 1855, and some intervening days, sold of the property of these defendants in execution, (not knowing often to which of them particular articles belonged,) lands, negroes, live stock, &c., to the amount of forty-four thousand dollars or thereabouts, most of which is yet in the hands of the sheriff, or of the Commissioner in Equity; the execution in the case to which this issue relates being one of the oldest, but there being many junior executions, more than sufficient to exhaust the proceeds of sale, independent of this case; and the two confessions above mentioned being the only two which were ever made, or which ever professed to have been made, by or for the Bivingsville Cotton Manufacturing Company:

"That in April, 1856, a bill in equity was filed by the Bivingsville Cotton Manufacturing Company, complainant, against Simpson Bobo and B. B. Foster, defendants, praying that the judgment for fourteen thousand dollars, above mentioned, should be set aside; and after answer filed, a decree was, upon the reading of the bill and answer, made at June, 1856, setting aside that judgment: '*each party to pay his own costs,*' having been in the handwriting of the Chancellor,

Columbia, May, 1858.

added to the decretal order drawn by Mr. Sullivan, the complainant's solicitor :—

“That nothing in those proceedings in equity was said about the confession for six thousand dollars now in question, and before the motion made in this case in November, 1856, George Leitner had removed with his family and property to the State of Florida.

“In the course of the testimony, the defendant in issue was permitted to read every thing that was on the declaration, which was part of the record adduced by the plaintiff; and the defendant was restrained from going into proof of his suretyship to Miss Poole, and of sales of stock to the Bivingsville Cotton Manufacturing Company, upon the ground that the issue made involved not the fairness of the consideration for the judgment, but only the legal validity of the act of confession.

“The bill in equity above-mentioned was held to be competent but very feeble evidence for the defendant of what was stated therein. The answer was held to be evidence of nothing but its own existence. Upon the statement made that it contained the defendant's consent to the setting aside of the judgment of fourteen thousand dollars, that portion of it was read by the defendant; another portion, said to be of contrary import, was then read by the plaintiff; and the result was, that the equity proceedings served no purpose but to show action by this plaintiff upon a kindred subject, whilst he was silent as to the judgment now in question.

“I endeavored to make the jury understand the questions upon which their response was desired, and to leave to their judgment the evidence, direct and circumstantial, bearing upon these questions, so that the verdict might be the unbiased decision of the fact which the Court of Appeals desired to be ascertained. What should be the ultimate effect of the finding, I did not feel myself called on to determine upon the trial of this issue. To have held that a cor-

Bivingsville Manuf. Co. vs. Bobo.

poration could neither confess a judgment itself, nor by subsequent ratification confirm a judgment confessed by one of its corporators, would have been to refuse a trial of the issue that had been ordered. But what would amount to a valid confession by a corporation, and what to a sufficient confirmation of an invalid one, seemed necessary to be considered; and upon these heads the wide range of the argument demanded some instructions.

"I presented the Bivingsville Cotton Manufacturing Company in two lights: as an ordinary corporation, and as an extraordinary corporation under its peculiar charter; its two members as corporators, and as partners.

"I spoke of a confession of judgment as an act of the highest solemnity and force.

"I held that a corporation might confess judgment either before or after action brought, by a suitable writing under its common seal, affixed by the appropriate keeper of the seal; and that, perhaps, in the absence of a seal, a duly authorized agent might make a valid confession in an action previously brought. But I expressed the opinion that under the 42d section of the Act of 1785, (7 Stat. 232,) there could not, before action brought, be any valid confession made by attorney or agent, no matter how fully authorized; and of course that, before action brought, there could be no confession by a corporation without its common seal; nor any binding upon all the members of a partnership, without the signature of every partner.

"I took for granted, what the order for the issue implied, that a confession invalid of itself, might be confirmed by subsequent ratification; and I held that a ratification might be referred to any previous period when a gift of authority would have availed; and that this confession, whether the two members of the company were regarded as corporators or as partners, although it may have been invalid when it was signed might have been confirmed by the ratification of

Columbia, May, 1858.

the corporation or of the partnership, made after action brought; and that under the circumstances, such ratification made by George Leitner would be sufficient to confirm it, in either view.

"To constitute ratification, I held that the person ratifying must know and understand the act to be confirmed, and must plainly assent to and adopt it. Of the evidence of ratification, I left the jury to judge, holding that circumstances, if they convinced, might serve as well as direct testimony. The articles of agreement between the brothers, I did not consider as conclusive *inter sese*, if their subsequent acts, or the acts of one of them known to and approved by the other, showed an alteration of their agreement; much less should it, as I held, be conclusive and unchangeable as to third persons, whether their indenture was regarded as a letter of instructions from a corporation to its agent, or as articles of partnership between partners.

"To meet such views in the Court of Appeals as I thought must have suggested the alternative question, whether the corporation confessed the judgment, I directed the jury (notwithstanding the opinion I had expressed as to the necessity of the common seal, in a confession by a corporation before action brought,) to inquire whether E. C. Leitner at the time of making the confession, did in fact have authority from George Leitner to do that act, either as corporator or as partner. I think that on this head I was not so fortunate as to render my distinctions altogether intelligible to the jury. They returned a verdict which I had put into form as nearly as possible in the words they had written.

"The verdict as signed reads thus:

"We find that the Bivingsville Cotton Manufacturing Company did not confess the judgment in question, but that the same was confessed by E. C. Leitner duly authorized by his partner, George Leitner.

"We find that the said Company did, by subsequent ratifi-

Bivingsville Manuf. Co. *vs.* Bobo.

cation, confirm the said judgment confessed by one of the corporators.

B. F. KILGORE, *Foreman.*"

The plaintiff appealed and now moved this Court, for a new trial on the grounds :

1. Because there was no proof of authority, on the part of E. C. Leitner, to confess the judgment in question, nor was there any proof of subsequent ratification or confirmation.

2. Because the verdict is not in conformity with the issue directed.

3. Because no authority that could have been given E. C. Leitner, before suit, to confess judgment, would render the judgment valid, either in his character as agent or partner.

4. Because one partner of a corporation could not ratify a void or voidable judgment confessed by another partner, so as to bind the corporation.

5. Because it is respectfully submitted that his Honor erred in his charge to the jury, in the following particulars: 1st. In saying that a corporation, with the right to sue and be sued, in their corporate name, could confess a judgment. 2d. By instructing them that a subsequent ratification would confirm a voidable judgment, and that this was not void but voidable; and that such confession *could* be made by an agent duly authorized. 3d. That the authority to confess, or the ratification, might be implied, although the authority of E. C. Leitner, under the covenant between him and his brother, to act as agent, did not authorise him to confess; and that the original agreement might be considered as altered or enlarged, by the manner in which the agent

Columbia, May, 1858.

managed the business of the company; and 4th. In not telling the jury that the facts and circumstances proved could not, in law, amount to an authority to confess or establish a subsequent ratification.

6. Because there was no proof that George Leitner had any knowledge of the confession, or ever did an act or said a word, after it came to his knowledge, in confirmation of the same.

7. Because his Honor erred in receiving evidence to vary or contradict the written contract between the partners, and also in permitting portions of the bill and answer of defendant, in the case of the *Plaintiff vs. Simpson Bobo and B. B. Foster*, to be read in evidence, as well as the endorsement on the confession of judgment, inconsistent with the bill of particulars filed therewith.

8. Because the verdict is not sufficient in law to establish the judgment in question.

Sullivan, for appellant. No authority that could have been given E. C. Leitner, either in his character as agent or partner, before suit brought, to confess judgment, would render the judgment valid. *Mills & Co. vs. Dickson & Mills*, 6 Rich. 487; 7 Stat. 232; *Rankin & Birch vs. Lawrence & Johnson*, 4 Rich. 267. A corporation must necessarily act through an agent, and such agent no more than the agent of an individual, could confess a valid judgment before *suit brought*. A void act *cannot* be ratified. 26 Wend. 192; *McCullough vs. Moss*, 5 Denio, 567. It was incompetent to receive evidence to vary or contradict the *written* covenant which gave no authority to confess judgment. *Delafield vs. State of Illinois*, 26 Wend. 192, S. C. 2 Hill, 159. When an agency is constituted by a written instrument, the power of

 Bivingsville Manuf. Co. vs. Bobo.

the agent cannot be enlarged by evidence of usage. *E. C. Leinter* had no authority to confess the judgment. *Angell & Ames on Corporations*, 314; *Matter of Waterbury and others*, 8 Paige, 380; *McCullough vs. Moss*, 5 Denio, 567; *Farmers' Bank vs. McKee*, 2 Barr, 318; *Savage Manufacturing Co., vs. Worthington*, 1 Gill, 284; *Harwood vs. Humes*, 9 Alb. 659; *Chitty on Bills*, 31; *The Bank of Hamburg vs. Johnson*, 8 Rich. 42; *Havens vs. Hussey*, 5 Paige, 30; 4 Eng. C. L. R. 426.

Reed, Thompson, contra, cited 7 Cra. 305; 1 Har. & J. 426; Ang. & A. 265; 2 Kent, 282; 6 Porter, 166; 1 Peters, 264; 7 Rich. 525; 5 Hill, N. Y., 296; 1 Chit. on Bills, 31, note 1; 1 Johns. Cas. 110; 2 Johns. Cas. 424.

The opinion of the Court was delivered by

O'NEALL, J. The Act of 1838, (8 Stat. 463,) the Charter of the Bivingsville Manufacturing Company, made the corporators, partners, with the privilege of using a corporate name. *Planters' Bank of Fairfield vs. The Bivingsville Cotton Manufacturing Company*, 10 Rich. 95. The finding of the jury, "that the Bivingsville Cotton Manufacturing Company did not confess the judgment in question, but that the same was confessed by E. C. Leitner, duly authorized by his partner, George Leitner," was therefore right enough: and it may be at once conceded, that the confession under the authority of *Mills & Co. vs. Dickson & Mills*, 6 Rich. 487, would not, standing by itself, bind the firm. But the jury further found, that "the company (that is the partner, George Leitner,) did, by subsequent ratification, confirm the said judgment confessed by one of the corporators;" and the questions are, could such judgment be ratified? and if so, then are the facts sufficient to establish that conclusion?

1. It must be kept constantly in mind, that this is really nothing more than a question between co-partners using a

Columbia, May, 1858.

corporate name. George Leitner and E. C. Leitner were the sole members. E. C. Leitner made the confession, and it, as his act, was sufficient to bind him. Can George Leitner, the other partner, and thus the company, be bound by ratification? The whole difficulty about the corporation being bound is, that the confession was not under the seal of the corporation. In the case of partners, the general rule very clearly is, that the firm cannot be bound by any instrument under seal, executed by one in the name of the firm; but to that rule are the exceptions, that if made in the presence and by the assent of the partners; or if after execution, it be ratified by the absent partner or partners, it will bind the firm. *Fleming vs. Dunbar*, 2 Hill, 532; *Fant vs. West*, 10 Rich. 149. These cases fully show, that the ratification may be established by admissions or circumstances, which create a belief, that the absent partner or partners knew of the deed, and intended to be bound by it. Taking this to be law, I think that a judgment confessed by one partner or corporator, may bind the other, if the circumstances create a belief, that he knew and intended to be bound by the confession.

2. The jury have found the ratification, and I think very properly. In the first place, the debt was the debt of the company, money borrowed for the corporation from Miss Poole, and the purchase of the shares of Dantzler and Bobo, in the company. E. C. Leitner, by the express authority of his brother George, was the entire manager of the company, buying and selling as he pleased. The judgment was confessed November, 1853—and the motion submitted to set it aside was Fall Term, (November) 1856. Three full years passed, and the defendant, George, made no question. The shares of Dantzler and Bobo, to the amount of four thousand dollars, in the Bivingsville Cotton Manufacturing Company, were acquired by the credit secured in this confession. The whole property, real and personal, of the Bivingsville

Bivingsville Manuf. Co. vs. Bobo.

Manufacturing Company was sold by the sheriff, and the money in his hands arises from that source. This fact would, against an infant, constitute an implied ratification; and certainly against George Leitner, who is of full age, and very cognizant of his rights, it ought to have as much effect. Looking to all the facts which I have set out, I think the verdict was well warranted. The motion for a new trial and to set aside the judgment is dismissed.

WARDLAW, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, May, 1858.

WM. R. JOSEY *vs.* THE WILMINGTON AND MANCHESTER
RAILROAD COMPANY.

*Evidence—Negligence—Witness—Bond of Indemnity—
Damages—New Trial.*

In case against a Railroad Company, for carrying off plaintiff's slave without his knowledge or consent, mere proof of transportation is itself sufficient evidence of negligence to throw the onus on the defendants.

Where a witness is interested and a release will make him competent, such release must be given, and a bond of indemnity from a third person will not answer the purpose.

In case against a Railroad Company for carrying off the plaintiff's slave, the value of the slave is the highest measure of damages.

New trial granted for excessive damages.

BEFORE GLOVER, J., AT SUMTER, SPRING TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"This was an action on the case to recover damages for the loss of a negro woman named Rose, alleged to have been conveyed by the defendant's cars from Sumter District to Kingsville, in Richland District, where she was last seen in August or September, 1856.

"The night before she was carried by the cars, Rose was seen at Manchester, and the next morning she applied there for a ticket to go to Kingsville which was refused by the agent, because she produced no authority from her owner for that purpose. She was seen on defendant's cars between Green Swamp, near Sumterville, and Kingsville, and at the latter place she got from the cars and remained there a day or two, when she disappeared.

Josey vs. Railroad Company.

"J. R. Ivey, the conductor of the train on which Rose was carried, was offered as a witness, and an objection to his competency was sustained on the ground of interest. No release was proposed, but the defendant's counsel offered to give the witness a bond, which I declined, unless by the consent of the plaintiff's counsel.

"I held the following questions admissible. Alfred Scarborough was asked, at what amount he would estimate the damages to the plaintiff by the loss of Rose—and John C. Frierson was asked, how much in damages it would take to restore the plaintiff's loss. The former answered four hundred dollars—that it was the only negro the plaintiff had, and although he would not give four hundred dollars, yet a man that wanted such a negro would. The latter said three hundred and fifty dollars or four hundred dollars, and added, that he thought she was worth that.

"It was in connexion with defendant's negligence in permitting Rose to be conveyed to Kingsville that *Danner's case* was referred to, and the jury was instructed, that if she was carried without her owner's permission, negligence would be presumed, and if she was lost the defendant was liable.

"The jury found for the plaintiff three hundred and sixty-six dollars and sixty-six cents."

The defendants appealed, and now moved this Court for a new trial, on the grounds:

1. Because his Honor charged the jury that the principle ruled in *Danner's case* applied to this action, and that the onus was thrown on the defendants to rebut the presumption of negligence on their part in the particular case.

2. Because the testimony of the proposed witness, Ivey, (conductor) should have been received, the defendants offering to give him bond and security to be approved by the

Columbia, May, 1858.

clerk, and accepted by him, to indemnify him against any loss which might accrue to him by reason of the verdict sought to be recovered against the Company.

3. Because his Honor ruled as competent to the witnesses, Scarborough and Frierson, the following question, "What would you estimate Josey's damages at in consequence of the loss of the negro?"

4. Because the verdict was excessive, and as to the amount against the law and evidence.

Haynsworth, Moses, for appellants, cited *Danner's case*, 4 Rich. 329; *McClenaghan vs. Brock*, 5 Rich. 17; *Sill vs. So. Ca. R. R. Company*, 4 Rich. 154. On the offer to indemnify, the witness should have been received, 2 Carr. & P. 65; 12 Eng. C. L. R. 22; 12 Eng. C. L. R. 279; 4 C. & P. 256; 19 Eng. C. L. R. 256; *Chafee vs. Thomas*, 7 Cow. 858; *Lake vs. Auburn*, 17 Wend. 18; *Bent vs. Baker*, 3 T. R. 83; 5 T. R. 578; 2 East, 461; 1 Phil. Ev. 69; 1 Stark. 120; 13 Mass. B. 201; 8 Ired. 522. The questions propounded to the witnesses were incompetent. The witnesses should depose to facts, but here the opinions of the witnesses were given. *Lincoln vs. Saratoga and Schen. R. R. Company*, 28 Wend. 425; *O'Neill & Chambers vs. So. Ca. R. R. Company*, 9 Rich. 465.

Spain, Richardson, contra. The principle of evidence contended for, as applicable to this case, is, that where a slave is carried off without the knowledge or consent of the owner, negligence will be presumed, and the onus is on the defendant to rebut it. The principle is not new. 2 Green. Ev. § 222; Story on Bail. § 601, 602; *Christie vs. Griggs*, 2 Camp. 79. Ivey was incompetent. *Gas Light Company vs. City Council*, 9 Rich. 342. The value of the property was an important element in considering the question of damages

Josey vs. Railroad Company.

and the value of property is a matter of opinion. *Smith, Wright & Co., vs. Campbell, Rice, 352.*

The opinion of the Court was delivered by

WHITNER, J. The judgment of the Court in remanding this case for a new trial, will be rested on the single ground in which there is entire unanimity, reserving for another occasion, when it may arise, some of the points drawn into controversy.

A running commentary on the different grounds is, however, due to the argument submitted on each side.

The instructions of the presiding Judge on the question of negligence, is approved by this Court. That interference with a slave which creates liability on the part of a Railroad Company, as held in *Sill vs. S. C. R. R. Co.*, 4 Rich. 154, is when "wilful, officious, careless, or otherwise blameable, done with a knowledge or with just grounds for suspicion that it was contrary to the will of the owner." To this rule has been added in this case if the slave was transported without the owner's permission, and loss has resulted, negligence should be presumed. A proper security for this species of property, the high degree of caution indispensable on the part of the Company, in the proper observance of which the means for adequate explanation of attendant circumstances, shifting this presumption, should always be at hand, all combine to justify such a rule. The *onus* was properly on the company. But whilst the *onus* is thus cast, and for the reasons which influence, the *rigor* of the rule which at the next step excludes the employees on the score of incompetency, is felt by the Court. The ruling on circuit, it must be conceded, was in conformity with the case in 9 Rich. 342, *Gas Light Company vs. City Council*. It remains to be seen whether the Court on some other occasion will not modify the rule.

Columbia, May, 1858.

The objection was not removed by tendering the bond of indemnity by a stranger, even though approved by the clerk.

A bond from the company of course would have been equivalent to a release, and would have removed the objection. In another class of cases where important testimony cannot be otherwise secured, it may be that such a rule should be adopted.

The diversity of opinion which exists in reference to the third ground, would deprive any judgment now rendered on the point involved, of any value to the profession. It is proper to add, that the views entertained by some members of the Court have had the effect to induce a more ready concurrence in the judgment which is announced on the last ground.

We are constrained to say, that the rate of compensation fixed by the jury, finds nothing in the evidence to sustain it. The views that should influence in such cases are sufficiently presented in the case of *O'Neill & Chambers vs. S. C. R. R. Co.*, 9 Rich. 465. The value of the property in any supposable case of like kind, is the extreme measure of damages. There are considerations which distinguish this case from one in which a total loss of the property in question is clearly traced to the wrongful act complained of. This was at most a transportation scarcely out of the immediate neighborhood, from one depot to the next on the road, and each within the heart of the same jurisdiction. Apart from considerations bearing on the question of negligence, it is difficult to perceive how loss to the amount of the entire value could be regarded as resulting from this act—and with this assumption even, it is manifest there is no warrant in the evidence for the amount of the verdict. The slave was mentally an imbecile, physically a cripple, and morally a runaway, as to whom witnesses well hesitated to affix scarcely any market value.

The witnesses who spoke at all, seemed to have some

Josey vs. Railroad Company.

peculiar notion as to what might be her value to this plaintiff, although of comparatively little value to all others.

The verdict appears to us wild and capricious, and the motion for a new trial is granted.

O'NEALL, WARDLAW, GLOVER and MUNRO, JJ., concurred.

Motion granted.

Columbia, May, 1858.

W. H. B. RICHARDSON *vs.* J. H. DINGLE, JR.

Evidence—Witness—Hiring—Contract—Slave.

A party objecting to the competency of a witness on the ground of interest must make it clearly appear that he has a certain direct and immediate interest in the event of the cause itself. If his interest be doubtful, the objection goes to his credit and not to his competency. The terms upon which a negro was hired, may be shown by parol, although it appears that a promissory note was given for the amount of the hire. Defendant having hired a negro 'to work on his farm' employed him on a steamboat and he was drowned:—*Held*, that defendant was liable for the loss of the negro.

BEFORE GLOVER, J., AT CLARENDON, SPRING TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"The plaintiff sued in case to recover damages for the loss of a slave named Washington, hired to defendant in 1855, and drowned while employed on a steamboat, contrary, as is alleged, to the terms of hiring.

"The competency of W. F. Butler, a witness offered on the part of the plaintiff, was objected to on the ground of interest. From his confused manner and contradictory statements, it was difficult to ascertain the nature and extent of his interest. He once said, that whatever is recovered in this action, he expected to get, that when he pays back what he owes the plaintiff, he is to get back Washington, and other slaves; that he has paid the plaintiff some of his debt and has received some of the negroes back. This, however, he afterwards either denied or qualified.

"His examination enabled me to collect the following facts:—Butler, who was much embarrassed, had confessed a

Richardson vs. Dingle.

judgment to plaintiff for a large sum, and under the *fi. fa.* entered on that confession, Washington and other negroes were sold and bought by plaintiff. There was and still is an understanding between them, that, as Butler shall pay for the negroes, the plaintiff will deliver them to him. I held Butler competent, who said that defendant hired Washington and other negroes of plaintiff in 1855, to work on the farm which he superintended; in September, Washington was ordered to Wright's Bluff, to go on the steamer; Butler advised the defendant not to send him unless he informed the plaintiff; defendant replied, "you are an old granny, there is no danger." The defendant told Butler, and also S. R. Tuning, that Washington was drowned from the steamer, and he told the former that it occurred about Pond Bluff, between Nelson's and Murray's Ferries.

"A promissory note was given for the hire of Washington and other negroes, and the defendant had served a notice on plaintiff to produce the note on trial, which was done, and the note was handed to defendant's counsel; but it was not offered in evidence by either plaintiff or defendant, nor was I advised of the contents. The only evidence of the terms of hiring was the statement of Butler, who said that the negroes were hired by the defendant "to work on the farm." This was objected to because the note was higher evidence and should have been produced. It was produced, however, but not offered; and the evidence of Butler was admitted as it did not appear to me objectionable on the ground insisted upon. Parol evidence of the understanding of the parties and terms of hiring at the time of the contract, may be admitted, even if a note was given.

"The jury found a verdict for the plaintiff."

The defendant appealed, and now moved this Court for a new trial on the following grounds, viz :

Columbia, May, 1868.

1. Because his Honor held that Butler was a competent witness, whereas it is submitted that Butler had a direct interest in the event of the suit.

2. Because his Honor allowed parol proof of the terms of hiring, although it appeared that there was written evidence in relation to the hiring.

3. Because the verdict is contrary to evidence in this, that the testimony of Butler (on which only the case rested) was unsatisfactory and insufficient, and evidently biassed.

4. Because the verdict is contrary to law in this, that on the fact as sworn to, the defendant had not incurred any legal liabilities, not having employed the negro in any dangerous work, nor in any work incompatible with the terms of hiring.

M. B. Moses, Bellinger, for appellant, cited on first ground *Cavan vs. Dunlap*, Chev. 248; *Clery vs. Spears*, 2 Sp. 690; *Brown vs. O'Brien*, 1 Rich. 270; *Gist vs. Rogers*, Rice, 86; and on the fourth ground, *Duncan vs. Railroad Company*, 2 Rich. 613; *McLaughlin vs. Lomas*, 3 Strob. 85; *Mikel vs. Mikel*, 5 Rich. Eq. 221.

Moses, Richardson, contra, cited 1 Green. Ev. § 387, 390; *Knight vs. Knotts*, 7 Rich. 85.

The opinion of the Court was delivered by

WHITNER, J. It may be safely assumed that the interest which disqualifies a witness must be a certain legal and immediate interest in the event of the cause itself. The test is found in a narrow compass, "whether the record in that cause will affect his interest."

Richardson vs. Dingle.

The party objecting must sustain his exception by satisfactory evidence. It is not enough that a doubt is created, for then it is manifest the safer rule is to hear the witness.

In *Bent vs. Baker*, 3 Term Rep. 27, Lord Kenyon, Ch. J., presents some views, instructive and apposite at this day, and in such a case as the one under consideration. Referring first to Lord Mansfield who had said in *Walton vs. Shelley*, 1 T. R. 300, that "the old cases upon the competency of witnesses have gone upon very subtle grounds. But of late years the courts have endeavored, as far as possible, consistent with those authorities, to let the objection go to the *credit*, rather than to the *competency* of a witness;" and to Lord Hardwick, who said in *King vs. Bray*, Rep. Temp. Hard. 360, "That whenever a question of this sort arose, on which a doubt might be raised, he was always inclined to restrain it to the *credit* rather than to the *competency* of the witness, making such observation to the jury as the nature of the case should require," and thus fortified Lord Kenyon, felt no scruple in declaring his concurrence. If we turn to the circumstances of this case we look in vain for such facts as would have justified the rejection of the witness. Surely it cannot be said there was any evidence to establish a binding subsisting contract between the plaintiff and witness, such as would give the latter an interest in the recovery sought, much less when to the statement in the report is superadded the further fact to which the witness testified, that he had rendered a schedule, and made an assignment without any intimation of any such interest.

The precise point made in the second ground of appeal was decided in *Knight vs. Knotts*, 8 Rich. 35. The promissory note was in Court, and in the hand of appellant's counsel, and if it contained anything beyond a mere promise to pay money it should have been brought more distinctly to the view of the Judge.

The third ground was abandoned, and the fourth, very

Columbia, May, 1858.

little relied on, is very fully responded to by the evidence, the verdict, and the authorities cited in the brief and cases referred to in them.

The motion for a new trial is dismissed.

O'NEALL, WARDLAW, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Wilson vs. Huggins.

SOLOMON B. WILSON vs. JOHN S. HUGGINS, EXECUTOR OF
HENRY WELCH.

Implied Contract—Executors and Administrators.

Where necessaries are furnished the slaves of testator before probate of the will, at the instance and on the credit of a legatee, the executor after probate will not be liable for the necessaries upon any implied contract.

BEFORE MUNRO, J., AT DARLINGTON, SPRING TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"The plaintiff's demand amounting to forty-seven dollars and eighty-nine cents, is for bacon, clothing, blankets, shoes, &c., furnished the slaves of the estate of defendant's testator. It appeared that in the year 1852, and while the validity of the testator's will was the subject of contest, the testator's widow, to whom a life estate in the plantation and slaves was given by the will, took charge of the same, and directed the plaintiff to supply the articles in question. Some time after the will had been admitted to probate, and the defendant had qualified as executor, upon his refusal to pay the plaintiff's demand, the present action was brought.

"I held, that an executor can only be held personally liable for a debt contracted for his testator's estate upon an express undertaking, but that the law would not raise the implication of a contract in such cases, the tendency of which, would be, to subject him to personal responsibility without the means of showing that the estate was either totally, or partially insolvent."

The plaintiff appealed on the grounds:

Columbia, May, 1858.

1. Because the defendant having neglected to furnish the slaves of the estate with necessary food and clothing, was in law and justice bound to pay the plaintiff for such necessities supplied by him.

2. Because on the proof made that the articles supplied to the slaves of the estate were necessary and proper, the law will raise an implied assumpsit against the defendant as executor.

3. Because on the proof and law applicable thereto the decree should have been for the plaintiff to the amount of his demand.

Dargan, for appellant,
Spain, Norwood, contra.

The opinion of the Court was delivered by

GLOVER, J. Except for the contracts and liabilities of his testator, the executor is not responsible in his representative character. His duty is to pay the debts of his testator and not to contract new ones, as executor. If the necessities of the estate require it, his control over the personal property enables him to provide the means for meeting all debts properly incident to his trust, and a power conferred upon him to bind the estate by his contracts, even for necessities, would be liable to great abuse in its exercise. For goods sold and delivered or for work done, at his request, the executor may bind himself personally but not as executor, although he may have assets; and this is the plaintiff's case. He furnished food and clothing for the testator's slaves at the request of the widow, who is tenant for life under the will, and sues to charge the executor *de bonis testatoris*. If he is not bound in his representative character by an express promise, an implied one cannot create a higher obligation; nor do the peculiar circumstances relied upon make it an exceptional case. A personal liability attached in the case of

Wilson vs. Huggins.

Bell vs. Fairchild, (2 Brev. 129,) and the promise was implied from high moral considerations which should prompt every man to the discharge of a duty that justice and humanity enjoin. The obligation to pay for food and clothing, it is said, depends upon the same considerations of duty and humanity as bind an executor to pay the expenses of a funeral; and cases may be found where, in England, with assets, he has been held answerable for such expenses on his implied promise. (*Tugwell vs. Heyman*, 3 Camp. 298; *Rogers vs. Price*, 3 Younge & Jer. 28.) But in a late case (*Corner vs. Shew*, Ex'or, 3 Mees. & W. 350), it was said, that if this decision is right the only point determined was that, whether on an implied promise or on an express contract, the executor is personally liable and not in his representative character. "There is no case which goes the length of deciding, that if the funeral be ordered by another person, to whom credit is given, the executor is liable," (*Brice vs. Wilson*, 3 Nev. & M. 312.) It follows, therefore, that the widow having ordered the food and clothing, and the credit having been given to her, Huggins, as executor, is not liable. The liability of an executor or administrator in this State for the expenses of a funeral depends upon the Act of 1789 (5 Stat. 11), directing the order in which the debts due by the testator or intestate shall be paid, which provides, first, "for the funeral and other expenses of the last sickness," &c., and as these are expressly classed among the debts of the testator or intestate, they may be recovered against the executor or administrator in his representative character. No analogy certainly can be found in the responsibility created by this Act, which will aid the plaintiff in support of his motion, which is dismissed.

Motion dismissed.

O'NEALL, WARDLAW, WHITNER, and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, May, 1858.

SARAH JANE ETTERS vs. SAMUEL ETTERS, ET AL.

Evidence—Magistrate's Judgment.

Since the Act of 1839, a magistrate's judgment can be proved only by his book, which the Act requires him to keep—the execution and oath of the magistrate are insufficient.

BEFORE O'NEALL, J., AT YORK, EXTRA TERM, APRIL, 1858.

The report of his Honor, the presiding Judge, is as follows

“Trespass for seizing and selling a mule.

“In this case, the plaintiff proved the execution of a bill of sale to her of a mule described therein, by the former owner, James Etters, dated 9th January, 1857. It appeared that Samuel Etters and William C. Black, who alleged that they were creditors of James Etters, caused their co-defendant, Hamilton Wilson, to seize and sell the mule. The defendants attempted to show that they were execution creditors of James Etters, but failed to do so. The magistrate, Esquire Hardin, proved his executions, but had not his judgments and the summons. • This testimony was objected to, and of course excluded. It appeared that the mule was probably the only valuable article of property James Etters possessed. Esquire Hardin, John Hardin, and Theodore Fulton thought the plaintiff could not pay for the mule. But Esquire Hardin, and Phillip Etters proved that she had about two hundred dollars loaned out at or about this time. She had the possession of the mule after she bought. The case was properly submitted to the jury who found for the plaintiff ninety dollars—the price for which the mule sold.”

The defendants appealed, and now moved this Court to set aside the verdict on the grounds:

Etters vs. Etters.

1. Because the executions under which the mule was levied on and sold, were produced in Court; proved by the magistrate who issued them, and it was stated by him, that he had issued summons, and rendered judgments upon the note and account due defendant Black, but that he had left a portion of the record at home.

2. That the inadvertence of the magistrate in not bringing the entire record should not prejudice the defendants' rights, as both they and their attorneys were under the impression the records were in Court, and were so informed before going into trial.

3. Because the sale of the mule by James Etters to the plaintiff was clearly proved to be fraudulent, and substantial justice requires that a new trial should be granted in order that the full record may be produced.

Wilson, for appellant. A magistrate's execution is sufficient evidence that a judgment has been rendered, as there is no law which requires magistrates to make a record of their judgments. *Maybin vs. Virgin*, 1 Hill, 420. The executions were produced and proved by the magistrate, but his Honor held that they were not sufficient evidence of the judgments. *Griffin vs. Heaton*, 2 Bail. 59; Act 1839, 11 Stat. 14.

Williams, contra, cited 1 Green. Ev. 282.

The opinion of the Court was delivered by

O'NEALL, J. Under the 1st ground, it has been contended that the executions were sufficient evidence of the judgments. Before 1839, and under the authority of *Maybin vs. Virgin*, 1 Hill, 420, such would have been the rule. The reason of that decision was, there was then (1833) no law requiring a magistrate to make "a record of his judgments."

Columbia, May, 1858.

The Legislature very wisely in 1839 provided in the 5th section of the Act of that year, (11 Stat. 14,) that "each magistrate should keep two books, one for civil, the other for criminal cases, wherein he shall insert all his proceedings in each case by its title, showing the commencement progress and termination thereof, as well as all fees charged or received by him and shall produce the same when required for the inspection of the solicitor of the circuit; and at the expiration of his term of office, shall deposit the same in the clerk's office for the district for which he was appointed."

In the 15th section, p. 18, is the provision: "In case the plaintiff shall discontinue or be non-suited, or the complaint be disproved, the magistrate shall award proper costs against such plaintiff; and if the demand or any part thereof be sustained, he shall give *judgment* therefor, together with the costs and having *entered the same in his book* may issue execution for such amount so adjudged," &c. This provision was, I have no doubt, in analogy to the proceedings on sum. pro. in which the decree entered on the journals of the Court is the judgment.

The magistrate's book and judgment therein is a *quasi* record and must be adduced and proved to authorize the execution. The objection was, therefore, well taken on the circuit. Indeed it seemed to be hardly questioned by the defendants.

To enable them to show that the sale of the mule was fraudulent, it was necessary that it should be shown that Black and Etters were judgment creditors. Being unable to produce their judgments their defence was utterly in vain. There could be no fraud unless against creditors having a right as against James Etters to sell.

The ground of surprise cannot avail the defendants. It was their business to know that they had their proof so that it could be properly given in evidence. Failing to have it,

Etters vs. Etters.

was their misfortune, but the plaintiff is not answerable for that.

The motion is dismissed.

GLOVER and MUNRO, JJ., concurred.

WARDLAW and WHITNER, JJ., dissented.

WITHERS, J., absent.

Motion dismissed.

Columbia, May, 1858.

DRUSILLA DOUGLASS vs. JOSEPH DICKSON.

Dower—Estoppel—Power—Executors—Transitory Seisin.

Where one has possession under titles derived from demandant's husband, he is estopped, it seems, from showing that the husband's title was bad, where it was more than twenty years old and had never been questioned. A contract by testator to sell a particular tract of land, does not revoke, so far as it relates to that tract, a power in his will giving his executors authority to sell his lands for division. The executors may carry out the contract and convey the tract to the purchaser.

If the husband acquire title beneficially and for his own use, the right of dower attaches, although his seisin be but for an instant, as where he immediately conveys to another.

BEFORE WARDLAW, J., AT ABBEVILLE, SPRING TERM,
1858.

The report of his Honor, the presiding Judge, is as follows :

"Dower demanded in three hundred and thirty-five acres. Issued upon the plea of nul seisin in the husband.

"The demandant showed that the defendant was in possession, under titles derived from Donald Douglass, her deceased husband; and that her said husband was legally seized by virtue of a conveyance made to him by the executors and executrix of John Burton, former owner of the land.

The defendant insisted that Donald Douglass was never legally seized of any part of the land, because the executors and executrix aforementioned, had not power to convey; and that at any rate he had as to a portion of the land, only such instantaneous seisin as would not confer the right of dower, because according to previous agreement between the said executors and executrix, and the said Donald Douglass, a conveyance of the said portion from the said Donald Douglass

Douglass vs. Dickson.

to one of the said executors, was made immediately after the whole had been conveyed to the said Donald Douglass.

"John Burton on the 9th July, 1836, by writing, bargained to convey the greater part of the land in question to Donald Douglass. On the same day, John Burton executed his will, whereby he devised a tract of land, adjoining that now in question to his wife, Caroline C. Burton, for life, and at her death to be divided amongst certain children named. To each of these children he had previously bequeathed certain articles, and "an equal share in the balance of my estate," and to other persons he had given pecuniary legacies. No special mention was made of the land bargained to Donald Douglass. The following clause closed the will: "I will that all my estate, except that portion willed to my wife, be sold and divided as above directed. I leave my wife, Caroline C. Burton, John A. Burton, and my son, James Burton, my lawful and constituted executors, to manage and make settlement of my estate according to this will."

"The purchase money of the land bargained to D. Douglass, was payable in one, two, and three years, with interest after the first year.

"For a parcel consisting mainly of the residue of John Burton's lands, and perhaps partly of some of that bargained to D. Douglass, the executors and D. Douglass wished John A. Burton to have title. The executors and executrix, after proper payments made or secured to them, conveyed the whole three hundred and thirty-five acres now in question, to Donald Douglass, and he instantly conveyed a portion thereof, being the parcel above mentioned, to John A. Burton.

"I overruled the defence, and the demandant had a verdict."

The defendant appealed and now moved this Court for a new trial:

1. Because his Honor, the presiding Judge, erred in ruling

Columbia, May, 1868.

that the deed of Donald Douglass was an estoppel, preventing investigation of actual title.

2. Because his Honor ruled, that under the will of John Burton, his executor and executrix could convey the legal interest in the land, sold to Donald Douglass by the testator himself.

3. Because his Honor ruled, that an instantaneous and transitory *seisin* of Donald Douglass vested in the demandant the right to dower.

Thomson, for appellant, Under the second ground of appeal, submitted for defendant. 1st. That the executors and executrix had only a power to sell the property embraced in the will, and until sale made, the title was in the heirs of testator. *Thompson & Smith vs. Gaillard*, 3 Rich. 418; *Executors of Ware vs. Murph*, Rice 54. 2d. That as a question of fact, the testator executed his will and sold the land to Donald Douglass on the same day; but had these acts in his mind as separate transactions, and did not intend by his will to confer a power to sell land which he expected to sell himself. 3d. That as a question of fact and law, the sale of the land to D. Douglass was subsequent to the making of the will; and was *pro tanto*, a revocation of the power to sell. 1 Williams on Executors, 112; 2 Crabb's Law, Real Property, sec. 2068; *Walton vs. Walton*, 7 Johns. Ch. 258; *King vs. Sheffey*, 8 Leigh, 614. 4th. That under a power to sell and divide proceeds, the executors and executrix had no power to convey where the testator had sold himself. *Pick vs. Pick*, 9 Yerg. 301. Under the third ground he submitted; 1. That a wife is not entitled to dower if her husband's *seizin* has been only for an instant, and not beneficially for his own use. 2 Crabb on Real Property, sec. 1124; Preston on Estates, 546, *et seq.*; *Holbrook vs. Finney*, 4 Mass. 566; *Clarke vs. Monroe*, 14 Ib.

Douglass vs. Dickson.

851; *Frazier vs. Center*, 1 McC. Ch. 279. 2. That D. Douglass was a mere instrument; the executors and executrix through him intending to make title to one of their number. 2 Crabb on Real Property, sec. 1172; 4 Kent 39, and note; *Sneyd vs. Sneyd*, 1 Atk. 442. He further cited *Gillam vs. Moore*, 4 Leigh, 80; *McCauley vs. Grimes*, 2 Gill. & Johns. 324; 15 Johns. R. 459; *Jackson vs. Dewitt*, 6 Cow. 316; 1 Johns. Cas. 90.

Wilson, contra. As to all questions except the transitory seizin defendant cannot make them. He is estopped. *Pledger vs. Ellerbe*, 6 Rich. 269; *Gale vs. Price*, 5 Rich. 526; 2 Hill N. Y. 304; *Brown vs. Potter*, 17 Wend. 164. The doctrine which exempts the estate from dower in cases of transitory seisin is not applicable to this case. *Stanwood vs. Dundee*, 14 Maine, 290; *Nash vs. Preston*, Cro. Car. 191. There was no evidence that there was any previous agreement to convey. If husband takes not for his own use but only to convey to another, then the right of dower does not attach. But where he takes for himself the land is bound for dower even though he immediately convey to another. The cases of mortgage proceed upon the principle that the title passed subject to the lien. The previous agreement constituted the lien and the mortgage is but the legal evidence of it.

Thomson, in reply. The doctrine of estoppel does not apply to this case. The defendant may not dispute the title under which he entered, but he may show that the title is bad. Sug. on Powers, 248; 2 Crabb § 1993.

The opinion of the Court was delivered by

WHITNER, J. Two objections are presented by this appeal to demandant's recovery. First, that the deed of conveyance to demandant's husband, conferred no title because made by certain executors who, it is contended, had no power

Columbia, May, 1858.

to convey. The defendant himself claims through the husband and the inquiry is suggested whether he is not estopped from denying title in one under whom he has entered. Nelson, C. J., in *Browne vs. Potter*, 17 Wend. 164, so held and cited as authority on which he relied, Cruise, 148-9; 2 Bac. Abr. 333-371 n; 1 Co. Litt. 665, n. g; Park on Dower 44, and *Taylor's case*, Sir. W. Jones, 317—with other cases in the same State and elsewhere.

In this State, whilst it is understood, the general doctrine is held that one who enters under another may not deny the title thus admitted, yet exceptions have been recognized in peculiar cases, and the inquiry will be extended whether any good reason is here found for extending the favor of such denial.

The defendant has not only accepted the deed of the husband but entered, and yet holds under it, has never acquired any other title, has never in any way been disturbed in his possession, and though years have elapsed since the deed by the executors, no ground is suggested for reasonable apprehension that the title thus acquired ever will be called in question. In *Gayle vs. Price*, 5 Rich. 527, the judge in delivering the opinion in a case of dower, says, that such a defence, under such circumstances successfully maintained, had never yet been known amongst us—a branch of *Pledger vs. Ellerbe*, 6 Rich. 266, proceeds upon the same doctrine. We have in this case a deed which has proved good and effectual, subserving all the purposes of a perfect conveyance for more than twenty years. It is manifest, therefore, that under such circumstances the objection could not avail the defendant.

But in fact the executors of Burton were authorized by the will to sell and divide the estate of testator, except the portion willed to his wife, and because the testator in his lifetime subsequently negotiated a sale, it is insisted the power was thereby revoked.

The force of the objection is not perceived. The power to

Douglass vs. Dickson.

sell confers also a power to convey, and even adopting the line of argument on which the objection rests, why maintain that the revocation was entire? The object should be to effect and not defeat the intention of testator.

The testator contemplated a sale for division, and his inchoate act was adopted and consummated, and the division in fact made, and surely this furnishes no just cause of impeachment of their act. The alleged sale was shown by a memorandum in writing on the same paper containing the will contemporaneously executed, without any corresponding obligation on the part of the purchaser, directory to his executors, and whether binding or not, could not operate to defeat the scheme of the will, and make void the act of his executors. The defendant at least cannot avail himself at this late day of such an objection.

The remaining question has proved a fruitful source of litigation, and at this day minute accuracy in laying down a general proposition covering the class of cases would be extremely difficult. In 3 Bac. Abr., Dower C., founded on Co. Litt. 31, the principle is announced, that "in some cases though the husband be seized in fact, yet his wife shall not have dower, *as of an instantaneous seisin*,"—as shown in a note this proposition though broadly laid down is by no means regarded as general—a transcript of the note well expresses what is sustained by authority throughout. When the same act which gives the husband the estate conveys it out of him again; when he is the mere instrument of passing the estate, the transitory seisin does not in general seem sufficient to entitle the wife to dower. The mere duration of the seisin does not of itself constitute the exception. In an ancient case *Broughton vs. Randall*, said to be in Cro. Eliz. 503; a father and son who had been attainted of felony were executed together, and the widow of the survivor was endowed, though her right depended on the very brief seisin of her husband during the death struggle that intervened. Though this was

Columbia, May, 1858.

an extreme case, the principle has been recognized in modern times.

So, too, on the other hand, where there has been a transitory seisin as above enumerated, the authorities are abundant, and especially wherein the premises are mortgaged to secure the purchase money. Cro. Car. 191; 2 Bac. Abr. 373; 1 Tho. Coke, 576; 1 Bay. 312; 1 McC. Ch. 279; 14 Mass. 352; 12 S. & R. 70. The character of the seisin as well as the duration enter into the consideration.

But the facts disclosed in the evidence are conclusive of this branch of the case, likewise. Without stopping to inquire whether in any view the case is brought within the exception, the deed from the husband establishes the distinction. Recurring to the note in 3 Bac. Abr. Dower C., relying on 2 Black. Com. 132; Preston on Estates, Tit. Dower, 546; when the husband has a seisin for an instant, *beneficially for his own use*, the title to the dower shall arise in favor of the wife. The distinction has been recognized and maintained by modern text writers and judges. The deed referred to contains the following: "It is also hereby understood and agreed on, between the said John A. Burton and the said D. Douglass, that I the said D. Douglass reserve to myself, my heirs and assigns forever, the right to raise a mill-dam on Long Cane creek, and flow all the above mentioned lands that shall be considered necessary for the benefit of the said D. Douglass' mills." This was the benefit which doubtless moved the purchase, and furnishes the solution for this otherwise singular transaction.

The motion for a new trial is dismissed.

O'NEALL, WARDLAW, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

Wadsworthville Poor School vs. McCully.

THE TRUSTEES OF THE WADSWORTHVILLE POOR SCHOOL
vs. STEPHEN MCCULLY.

THE SAME vs. JOEL TOWERS.

Presumptions—Conveyance—Limitations, Statute of.

To rebut the presumption of a title derived from trustees, arising from twenty years' possession, it is not sufficient to show that the trustees were denied power to sell by the will creating the trust if the will gives them the power to exchange.

An Act suspending the statute of limitations as to certain lands, does not affect the presumption of a conveyance from the owner, arising from twenty years' possession.

BEFORE WARDLAW, J., AT ANDERSON, SPRING
TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"These were two actions of trespass to try titles, brought to recover two lots of land in the Village of Anderson.

"The plaintiff showed, 1. A grant to William Turpin, dated February 6, 1786, for four hundred and eighty acres on branches of the Generostee; 2. A conveyance of the land, thus granted, from William Turpin to Thomas Wadsworth, May 2, 1797; 3. The will of Thomas Wadsworth, dated September 17, 1799, devising his lands to certain persons in trust for the establishment and maintenance of a Poor School; 4. An Act of the Legislature (1810, 5 Stat. 622,) incorporating the trustees of the Wadsworthville Poor School; 5. An Act (1805, 5 Stat. 496,) suspending the operation of the Statute of limitations as to the lands devised by Thomas Wadsworth; 6. Evidence concerning the location and the trespasses.

Columbia, May, 1858.

"Joseph Cox, Esq., surveyor, had so located the grant, as to include the lots in dispute, and the greater part of the village. It was denied that any part of the land within his survey, was within this grant; and upon this subject there was left ground for the very decided opinions contrary to Mr. Cox's, which were expressed on the part of the defendants'. My own opinion was that Mr. Cox had probably found a place which suited the description in the grant, and that by further surveys its lines might be fixed—that according to any scheme, likely to be approved, the lot of the defendant McCully, would be found within the lines; but that the lot of the defendant Towers, being just within the lines laid down by Mr. Cox, might, upon an amended survey be excluded, although I was inclined to think that a true delineation would include it and something more outside of it.

"The defendants showed, 1. A grant to Adam Crain Jones for two hundred and fifty-one acres, January 20, 1787, which included McCully's lot, but not Towers'; 2. A conveyance from A. C. Jones to Bartholomew White, of the land thus granted, January 18, 1790; 3. Possession by Bartholomew White from some period at least as early as 1792, till some period at least as late as 1804; 4. An Act of 1826, appointing Commissioners to purchase land, lay out a village and sell lots—a resolution of 1827, appointing M. Gambrell receiver of moneys—and an Act of 1829, authorizing the receiver to make titles; 5. A plat made by M. Gambrell of the land purchased by the Commissioners, May 19, 1827; 6. Conveyances from M. Gambrell, receiver; 7. Possession of the lots under these conveyances since 1830, the defendants respectively being themselves the occupants for more than twenty-five years.

"In my instructions to the Jury, I favored the plaintiff's general views as to the location. I considered that McCully had, under the Statute of Limitations, shown a title out of the plaintiff, by White's possession prior to 1805; and I held

Wadsworthville Poor School vs. McCully.

that both defendants were entitled to the benefit of presumptions arising from lapse of time during their occupancy. The presumption of whatever is necessary to make rightful an enjoyment which has continued without interruption for more than twenty years, I held to be a presumption of fact, rebuttable, but still having an artificial force more than the natural efficiency of the circumstances, on which it is founded, to produce belief; that it does not arise in opposition to right shown to be in persons under a disability to sue; but that, independent of belief, a jury should make such presumption, because it is wise and expedient; and that the Act suspending the Statute of Limitations did not affect the presumption in these cases.

"The verdicts were for the defendants."

The plaintiffs appealed, and now moved this Court for a new trial, on the grounds:

1. Because, it is respectfully submitted, that his Honor erred in instructing the jury that twenty-five years' possession of the lands in dispute, raised the presumption of a grant, deed, or any thing that was necessary to perfect the title of defendants, and that it could not be rebutted but by the disability of a party to sue: and that the Act of 1805, suspending the Statute of Limitations as to these lands, could not affect such presumption.

2. Because his Honor instructed the jury that if they agreed with him that the defendants had been in possession for twenty-five years, it was their duty to find for them, without regard to the truth of the presumption arising from such possession.

Sullivan, for appellants. The presumption of title aris

Columbia, May, 1858.

ing from twenty years' possession, is not a conclusive presumption, but may be rebutted or explained. Law Library, 37 vol., p. 76, and note, (3d series.) In the case of *Darwin vs. Upton*, 2 Wms. Saunders, 175, c., Lord Mansfield says, "The enjoyment of lights with the defendant's acquiescence for twenty years, is such decisive presumption of a right by grant, or otherwise, that unless contradicted or explained, the jury ought to believe it. But it is impossible that length of time can be said to be an *absolute bar*, like a statute of limitations; it is certainly a *presumptive bar*, which ought to go to the jury." And Buller, J., there says, "If the judge in this case meant that twenty years' uninterrupted possession of windows was an absolute bar, he was certainly wrong. If only a presumptive bar, he was right." See, also, observation of Lord Mansfield in *The Mayor of Hull vs. Horner*, Cowp. 103. Again, in many modern works, the presumption of right from twenty years' enjoyment of incorporeal hereditaments, is spoken of as a conclusive presumption, (Green. L. E. 20, art. 17.) Per Lord Ellenborough in *Balston vs. Bensted*, 1 Camp. 465. An expression almost as inaccurate as calling the evidence a bar. If the presumption be conclusive, it is a *præsumptio juris et de jure*, and not to be rebutted by evidence; whereas, the clear meaning of the cases is, that the jury ought to make the presumption, and act definitively upon it, unless it is encountered by adverse proof. "The presumption of right in such cases," says Mr. Starkie, "is not conclusive; in other words, it is not an inference of mere law, to be made by the Courts, yet it is an inference which the Courts advise juries to make wherever the presumption stands unrebutted by contrary evidence." 3 Starkie Ev. 911, 3 ed.

Law Library, 37 vol., pp. 76-7. "The period of twenty years seems to have been adopted by analogy to the statute of limitations, 21 Jac. 1, c. 16, which makes an adverse enjoyment for twenty years a bar to an action of ejectment

Wadsworthville Poor School vs. McCully.

for, as an adverse possession of that duration gave a possessory title to the land itself, it seemed reasonable that it should afford a presumption of right to a minor interest arising out of the land." (But *quere*, how can the presumption arise in this case, when the statute of limitations is perpetually suspended and inoperative? *Trustees of the Wadsworthville Poor School vs. Metts*, 4 Rich. 50.) *Allston vs. McDowal* 1 McM. 444; *Rodgers, et al., vs. Mabe*, 4 Devereaux Law Rep., 180; *Collander vs. Sherman*, 5 Ired. Law Rep., 716. "The presumption of payment from the lapse of twenty years is a presumption of fact, not of law, but one which has acquired an artificial force, and admissions to rebut it, are governed by the principles regulating admissions to take a case out of the statute of limitations." *Stover & Barnes vs. Duren*, 3 Strob. 450; *Habersham vs. Hopkins*, 4 Strob. 240.

Reed, contra.

The opinion of the Court was delivered by

WARDLAW, J. It will be seen from the report that the instructions which were given to the jury, are misstated in the grounds of appeal. The presumption of title, arising from long continued possession, unquestioned and unexplained, was not held to be a presumption *juris et de jure*, irrebuttable, such as the Court might make; nor even one which the jury were bound to make without regard to the circumstances which contradicted it; but it was considered a presumption of fact to which an artificial force is ascribed by the law, and which the jury were recommended to make, not because they believed the fact, but because it is wise and expedient to respect what is consecrated by time, and to give the same measure to all in the same condition, by giving effect to the fixed period of twenty years as a rule, instead of producing the uncertainty

Columbia, May, 1858.

and inequality which must result from the various impressions which circumstantial evidence makes upon various minds, (See *McClure vs. Hill*, 2 Mills, 425; 12 Ves. 266.) This presumption is like the presumption of the payment of a bond after twenty years unexplained, and like the presumption of right that arises from the enjoyment of an easement for twenty years. Prescription, used in its strict sense, does not give title to lands, but only to things that lie in grant; but the ancient prescription is different from the modern presumption of a non-existing instrument; and many of our cases show that the presumption from long continued enjoyment is not less applicable to the land itself, than to any incorporeal incident appertaining to it. (*McLeod vs. Rogers & Gardner*, 2 Rich. 22; *Gray vs. Bates*, 3 Strob. 500.) The presumption is founded upon the supposed acquiescence of the person shown to have been the former owner, and infers such transfer of his right as legalized the enjoyment. Upon him is thrown the burden of rebutting the inference, and this he may do by showing that he endured the invasion of his right not because he acquiesced in it, but because he was under disability to resist it. Infancy has been regarded as such disability, for although an infant may sue, he is presumed to be without the discretion necessary for determining when and how to prosecute an action. The incapacity of the former owner to convey without direct violation of a trust has also been held to rebut the presumption of his conveyance. (*Habersham vs. Hopkins*, 4 Strob. 240.) Upon that holding, the plaintiff rests the only fact urged by him to rebut the presumption in this case. It is this: The will of Thomas Wadsworth denies to the trustees appointed in it for carrying out his intentions concerning a school, the power to sell any of his lands in fee, but it authorizes them to exchange them, acre for acre, for lands in the lower battalion of Laurens District. Conveyance from the trustees cannot then, it is said, be presumed, for it would have been in violation of their trust. *Non constat* however, for

Wadsworthville Poor School vs. McCully.

they may have exchanged—and beyond that, if necessary, a conveyance from Thomas Wadsworth during his life, or from William Turpin, Wadsworth's vendor, might be presumed, for no exercise of ownership under the grant to Turpin, at any time has been shown.

The plaintiff then falls back upon the Act of 1805, which suspended the Statute of Limitations as to the lands devised by Thomas Wadsworth, and upon the case of the *Trustees of the Wadsworthville Poor School vs. Metz*, 4 Rich. 50, which held that suspension to be perpetual. An examination of that case will show that the presumption which we are considering, would have availed for the defendant there, if his vendor had not acknowledged himself to be in under a lease; and further that presumptions from time and circumstances are necessary to the plaintiff's title, which is deficient in the want of a conveyance from Wadsworth's devisees to the plaintiff, an artificial person created by Act of incorporation in 1810. But we cannot perceive the influence which the suspending Act of 1805 has upon the presumption. No disability of the trustees, or of the incorporated body to sue was produced by it. Their acquiescence in trespasses upon their right derives no explanation from it. The presumption is independent of the Statute of Limitations; it applies to subjects not within the Statute, and it depends on principles which would operate if there was no such Statute. (See 2 Rich. 22; 3 Strob. 500; 1 McMul. 447.) The period of twenty years was originally adopted in analogy to the English Statute of Limitations; but it has no connexion with our Statute. It would be a great stretch of the special indulgence given by the suspending Act, to say that thereby the plaintiff was not only shielded against the effect of ten years' possession, (five in 1805), but was indemnified against all the effect of time and acquiescence.

This Court is satisfied with the instructions which were given, and with the verdict.

The motion is dismissed.

Columbia, May, 1858.

WHITNER, GLOVER and MUNRO, JJ., concurred.

O'NEALL, J., dissenting, said: I agree to the case against McCully. I dissent in the other case, on the ground that the suspension of the Statute negatived the presumption.

Motion dismissed.

Burkett vs. Moses.

H. G. BURKETT, FOR ASSIGNEE, vs. F. J. MOSES.

Assignment—Chose in Action—Discount—Notice.

An instrument not under seal, by which A agreed in the event of a recovery in a pending action of trover, to pay B a certain proportion of the verdict, is not assignable under the Act of 1798.

Where a chose in action, not assignable under the Act of 1798, is assigned, the debtor may avail himself of any discount against the assignor, acquired by the debtor after the assignment and before notice of it.

BEFORE GLOVER, J., AT SUMTER, SPRING TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"Pending an action of trover, brought by the plaintiff against John C. Rhame, the defendant executed the following agreement, January 6th, 1855: "In consideration of the transfer this day made to me by H. G. Burkett, of all his rights and claims to the case above stated, I do hereby agree in the event of a recovery for plaintiff in said case, to the amount of five hundred dollars or over, to pay the said H. G. Burkett, two hundred dollars, and in the event of a recovery of a sum of four hundred dollars, or between four and five hundred, or less than four hundred dollars, to pay him one third of such sum so recovered—and in the event of no recovery for the plaintiff, I am in no way held or bound to said H. G. Burkett for any amount whatsoever."

"On this agreement, H. G. Burkett made the following endorsement, 24th March, 1855: "For value received, I assign, transfer and set over to A. J. Moses, my right, title and interest in the within document as collateral."

"The action is brought on this agreement by H. G. Burkett,

Columbia, May, 1858.

for his assignee, A. J. Moses, to which the defendant pleaded the general issue and offered in evidence, under a notice of discount, two due bills given by H. G. Burkett to F. J. & M. Moses for professional services, dated in 1852 and 1854, and for an amount exceeding the plaintiff's claims under the agreement.

"Before this suit was commenced, the two due bills were transferred to F. J. Moses by the firm of F. J. & M. Moses; and Mr. Montgomery Moses, who proved this transfer, stated that he knew nothing of the transfer by Burkett to A. J. Moses of the agreement, when the two due bills were transferred to F. J. Moses. He also stated that F. J. Moses once proposed to Burkett, to deduct these due bills from the amount of the agreement, and that Burkett assented.

"Conceding that the instrument sued on was assignable under the Act of 1798, I held that the discount may be allowed, and especially, if the defendant had no notice of the transfer from Burkett to A. J. Moses until after the due bills were assigned to him.

"The verdict was for the defendant."

The plaintiff appealed and now moved this Court for a new trial on the grounds,

1. That the instrument sued on was assignable under the Act of 1798, and that no discount purchased or acquired after the execution of the assignment was admissible; whereas his Honor charged the jury to allow the discount if defendant became the owner before notice.

2. That even if the instrument sued on is not assignable under the Act of 1798, still the Court will protect the equity of a *bona fide* assignee and allow no payment or discount made or acquired after the assignment to prevail against the assignee

Burkett vs. Moses.

except under circumstances which do not exist in this case.

3. That a debtor can in no case be allowed a discount purchased or acquired after assignment and before notice, unless he can show that he occupies the position of one, who, according to the doctrines of the Court of Equity, is a purchaser for valuable consideration and without notice, and the defendant does not occupy that position.

Spain, Richardson, for appellant. The instrument sued on was assignable under the Act of 1798, 5 Stat. 330; *Folk vs. Cruikshanks*, 4 Rich. 243; *Waring vs. Cheeseborough and Campbell*, 4 Rich. 243, note; *Cay vs. Galliot*, 4 Strob. 482. The assignee is the legal owner, (*Thorn vs. Myers*, 5 Strob. 210,) and may sue either in his own name or in the name of the assignor, (*Coachman vs. Hunt*, 2 Rich. 450; *Mixon vs. Jones*, 1 Rich. 395,) and his rights are the same whether he sues in the one name or the other, (*Thorn vs. Myers, Mixon vs. Jones*.) It is well settled that no defence, whether by discount or otherwise, arising after notice of the assignment, is admissible, (*Mixon vs. Jones; Morris vs. Peay*, 1 Hill, 35,) and the appellant submits that the Act was intended to place all instruments, assignable under its provisions, on the footing of negotiable instruments (bills or notes) transferred after due. If that be the correct view, then no discount purchased or acquired after the assignment is admissible; and the *onus* is on defendant who must show that he held the discount at the time of the transfer, (*Cain vs. Spann*, 1 McM. 260; *Thorn vs. Myers*.) If the instrument be not assignable under the Act, still it is submitted that whatever formerly may have been the rule, modern decisions show that the Court will protect the equitable rights of the assignee, and that there is now no substantial difference between assignments of contracts not assignable at law, and assignments under the Act of 1798 and other

Columbia, May, 1858.

Acts, and the transfer of negotiable instruments after due—all now standing, so far as the rights of the assignee or transferee are concerned, pretty much on the same footing, *Tibbells vs. Weaver*, 5 Strob. 144; *Morris vs. Peay*; *Mixon vs. Jones*. Assuming that a note transferred to defendant after assignment and before notice may be pleaded as discount, then it is submitted that in such case, defendant must show that he holds as purchaser for valuable consideration and without notice, according to the doctrine which prevails in Courts of Equity, to this extent at least, that is, he must show that he paid a valuable consideration for the note, or that he is bound by contract from which he cannot be relieved if he fails to establish the discount, to pay value. For the rule in Equity see *Ellis vs. Woods*; 2 Sug. on Vend. Ch. 24, § 7 m., p. 1069; *Snelgrove vs. Snelgrove*, 4 Des. 287.

Haynsworth, Bellinger, contra, cited *Wilson vs. Dargan*, 4 Rich. 546; Act 1816, 6 Stat. 83; *Maybin vs. Kirby*, 4 Rich. Eq. 105.

The opinion of the Court was delivered by

MUNRO, J. In this case two questions are presented for our consideration by the grounds of appeal.

1. Whether the instrument sued on, was assignable under the Act of 1798.

2. Whether the assignment of a chose in action, without notice to the debtor, is sufficient to exclude any defence the latter may acquire against the assignor subsequent to the assignment.

If the action had been brought in the name of the assignee, the question raised by the first ground as to whether or not the instrument sued on was assignable under the Act of 1798, might properly have been made; but as the assignee has chosen to bring the action in the name of the assignor,

Burkett vs. Moses.

whose right to maintain it, whether the cause of action be assignable or not, can hardly admit of doubt; it is difficult to perceive why the question has been made at all, unless it may be considered as in some degree affecting the other question made in the case, namely, the necessity of communicating notice of the assignment to the debtor in order to exclude a subsequently acquired defence against the assignor.

Be that, however, as it may, it is sufficient on this branch of the case to say, that in the opinion of a majority of the Court, the instrument sued on, does not answer to the description of either of the classes of choses declared to be assignable by the Act of 1798; consequently, it is not such an instrument as the assignee by assignment can acquire a legal interest therein.

This brings us to the consideration of the remaining question in the case, as to whether the assignee of a chose in action without notice to the debtor, can exclude any defence the latter may acquire against the assignor, subsequent to the assignment.

There can be no doubt as to the general doctrine, that the assignee of a chose in action, although without notice, takes it subject to all subsisting equities against the assignor; but whether the assignee without notice of the assignment to the debtor, can be affected by any transaction between the assignor, and the debtor, subsequent to the assignment, is the question we are now called upon to decide.

As the claim of an assignee of a chose in action is one which is purely equitable, and constitutes a branch of the jurisprudence which is administered in another forum, it is proper that we should resort to the adjudications of that tribunal, in order that we may see how transactions of this sort are treated in that jurisdiction to which they appropriately belong.

In the case of *Ryall vs. Rowles*, 1 Ves. 348, it is said,

Columbia, May, 1858.

that debts are chattels, and that which is equivalent to delivery of moveables, is in the case of a debt, an assignment and delivery of the security, and notice to the defendant of the assignment; and again—"In the case of a chose in action, you must do every thing towards having possession which the subject admits; you must do that which is tantamount to obtaining possession, by placing every person who has an equitable, or legal interest in the matter, under an obligation to treat it as your property. For this purpose, you must give notice to the legal holder of the fund; in the case of a debt for instance, notice to the debtor, is, for many purposes, tantamount to possession.—If you omit to give that notice, you are guilty of the same degree of neglect, as he who leaves a personal chattel to which he has acquired a title in the actual possession and control of another:" see the whole doctrine discussed in the 2d vol. of *White & T. L. C.* p. 594, et seq. In the case of *Holbrook vs. Colburn*, 6 Rich. Eq. 289, Ch. Wardlaw remarks, "In every administration of well regulated equity, when the assignee conceals his interest and permits the assignor to remain in possession of the instrument of debt, and thus acquires a delusive credit to the prejudice of innocent parties, he loses the advantage of priority in favor of such parties. Notice, however, is exacted for the protection of the debtor, and third persons dealing with him in transactions subsequent to the assignment, and not for the disturbance of fixed pre-existing equities."

This, then, we perceive is the doctrine which is held by the Court of Equity, in relation to the assignment of choses in action, and the obligation which it imposes upon the assignee to communicate to the debtor, notice of the assignment; a doctrine which strongly commends itself to our approval, not less by the sound reasoning by which it is sustained than by the high standard of good faith which it inculcates. Let us for a moment reverse the picture, in order

Burkett vs. Moses.

that we may contrast it with the doctrine contended for. A single example will suffice.

A creditor assigns an open account against his debtor—the latter without the slightest knowledge of the assignment, pays up the debt to the creditor. Would not such payment by the debtor be in perfect conformity with his original undertaking? And will it be said, that the assignee of such a claim, who wilfully withholds from the debtor all knowledge of the existence of his assignment, has a higher equity, and one more entitled to the protection of a Court of justice than has the debtor?

Rather than incorporate into the jurisprudence which is administered in this Court, a doctrine which has little else to recommend it, than its tendency to encourage almost every species of covinous combination, it would be infinitely better for Courts of law to repudiate the whole doctrine, and leave it to be administered in that tribunal to which it appropriately belongs, and again fall back upon the antiquated doctrine of the common law.

“The great wisdom and policy of the sages and founders of our law, (says Lord Coke, 10 Co. 48,) have provided, that no possibility, right, title, nor thing in action, should be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression to the people, and the subversion of the due administration of justice.”

There is another ground however upon which the verdict may very well be sustained. I allude to the agreement between Burkett the creditor, and the defendant, by which the former consented to deduct from the demand sued on, the amount of the due bills which constitute the present discount. This it was perfectly competent for him to do, notwithstanding the discount consisted of co-partnership demands, upon the authority of the case of *Dargan vs. Wilson*, 4 Rich. 546. A majority of the Court however prefer to rest the decision

Columbia, May, 1858.

of the case, upon the broad ground of the want of notice to the defendant, of the existence of the assignment.

Wherefore the motion is dismissed.

WARDLAW, WHITNER and GLOVER, JJ., concurred.

O'NEALL, J., dissenting said. I dissent. 1st. The note was unnegotiable and assignable under the Act of 1798. 2d. The discount acquired after the assignment ought not to be allowed.

Motion dismissed.

Commissioners *vs.* Durant.

COMMISSIONERS OF ROADS *vs.* ROBERT R. DURANT.*Road Laws—Manning, streets of—Jurisdiction.*

The Act of 1855, to establish the judicial district of Clarendon, appoints Commissioners, who, "at the expense of the district," are to purchase a tract of land, "upon which they shall lay out a village," to be called Manning:—*Held*, that it is the duty of the Commissioners thus appointed to lay out and open the streets, and that, until opened and dedicated as highways, the Commissioners of Roads have no jurisdiction over them.

BEFORE GLOVER, J., AT CLARENDON, SPRING TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"The action was in the Summary Process jurisdiction to recover twenty-five dollars, a fine imposed by the Board of Commissioners of Roads for neglect of the defendant to send his slaves to open the streets in Manning. The names of the Commissioners are not used as plaintiffs in the action, which is brought by them as Commissioners of the Roads.

"By a resolution of the Board, Commissioner Lesesne was directed to order out the hands liable to work, to open the streets within the village of Manning. In March, 1857, the work was done, and the streets laid out and opened sixty and seventy feet wide, and the defendant failing to send his hands, was summoned as a defaulter to May, when the consideration of the default was postponed. August 10, 1857, he was fined twenty-five dollars and this suit was commenced on the day of February, to recover the fine.

"One witness stated that the distance from defendants to Manning, by Brewington is twenty miles; but Dr. Ingram said that he is certain it is not ten miles in a direct line.

Columbia, May, 1858.

"A motion for a nonsuit was made on the following grounds:

"1. Because the Commissioners did not sue in their individual names.

"2. Because the recovery was barred by the statute.

"On both grounds the motion was refused and a decree was given for twenty-five dollars."

The defendant appealed and now moved this Court to reverse the decree, or for a new trial, on the grounds:

1. That the Commissioners should have sued in their individual names as plaintiffs styling themselves Commissioners.

2. That the person who ordered out the defendant's hands was not a Commissioner.

3. That the road or street on which the defendant was summoned to work his hands was wider than the law permits.

4. That the proof was insufficient that the defendant resided within ten miles of the place where he was summoned to send his hands.

5. That the fine or penalty was barred by the statute of limitations.

6. That defendant had no notice of the meeting of the Board at which he was fined.

7. That defendant is not estopped by any action taken by the Board.

Commissioners vs. Durant.

Spain, Richardson, for appellant, cited on first ground *Commissioners vs. Guerard*, 1 Sp. 216; *Commissioners vs. McPherson*, 1 Sp. 218; 2 Brev. 295; Evans' Road L. 32, note 1; 11 Stat. 160; and under the third and seventh grounds they contended that the streets of Manning were not under the jurisdiction of the Commissioners of Roads. They are subject to a special jurisdiction created by the Act of 1855, sec. 2, 12 Stat. 417.

J. R. Haynsworth, contra. The Board is a corporation for certain purposes, and, as such, may sue as a corporation would sue. In *Miller vs. Ford*, (4 Rich. 376,) it is declared that they are *sub modo* a corporation; that they "have a corporate organization, having perpetuity and succession of members, and by law are constituted a Board," &c., and "to the extent of their duties and the liabilities which may be incurred in the performance of them, they have a corporate capacity." The duty is imposed upon them to sue in certain cases; in so far they are a corporation. "The Boards of Commissioners are quasi corporations and may sue without setting out their individual names." (*Commissioners vs. Murray*, 1 Rich. 341.)

Quasi corporation—what is it? Not properly, at any time, a single officer, as the governor or the clerk. The "term is applied to such *bodies* or *municipal societies*, which, though not vested with the general power of corporations, are yet recognized by statute or immemorial usage as persons or aggregate corporations with precise duties which may be enforced, which may be maintained by suits at law." They are only "restrained from a *general use* of the authority which belongs to these metaphysical persons by common law." (Bouvier's Dic. 400.)

Quasi corporation is *almost* a corporation; the description marking a resemblance and supposing a *little* difference. In this case the difference is small. *Points of resemblance*, (from text books.) 1. Corporation is an aggregate assemblage of

Columbia, May, 1888.

many persons joined in one fellowship. 2. Acting under a common name. 3. Created to support the common charge; to sue and be sued. 4. Deriving their existence from lawful authority. 5. Has power to raise money (by Act of 1825, the Commissioners of Roads have power to raise money.) 6. Has the inherent power of assembling at pleasure (Act of 1825). 7. A majority binding the minority thus acting as one man, (this is the very essence and nature of a corporation.) 8. Prescribed quorum for transacting business. 9. Perpetuity and succession of members. 10. Power to fill vacancies; and actions do not abate by death or removal.

2. *Unnecessary to set out individual names.*

If the Court declares that it is necessary that the parties to a writ should be as certainly designated as is *conveniently practicable*, it will not insist upon technical particularity, when it is inconvenient or impracticable. It would be *inconvenient* to set out the names, because they are a "numerous assemblage of individuals joined in one fellowship." *Impracticable*, because frequent changes are occurring, so that at the end of a suit the parties may be entirely different. *Inconvenient* to encumber the records with suggestions of such changes. *Unnecessary* because they act "under a common name," "have legal existence," &c.

Why must the parties to a writ be known? It is only necessary (as declared in 1 Spear, 216 or 220,) in order that the Court may know that it is brought by *proper authority*, and that there is a *party responsible for costs*. *Unnecessary* in this case, because the board from the nature of the case, from circumstance of appointment by the Legislature, are composed of the best citizens. Their appointment is almost a part of the law. Their meetings are public, freely advertised and held at regular and stated intervals. Their acts are public property, their individuality and personality for all proper purposes are patent or accessible to all. They are known to the public, and in law, *as a body*; and

Commissioners vs. Durant.

are always entitled as of their associate capacity. So that there can be no question, that, when the Board of Commissioners of Roads for Clarendon, a body recognized by law, bring suit as of their title, it is brought by *proper authority*.

As to their responsibility for costs.

Individually they are not liable for costs, (4 Rich. 382,) so that there is no use for their individuality to appear. *As a Board* they are liable, and as a Board "they have power to assess their respective districts and parishes for all necessary expenditures." And when they sue as a Board, whether their individual names appear or not, they are responsible for costs. They have a *fund*.

3. The plea is bad, because (1 Spear 217) "the office controls the interest, and not the interest the office," and it is in the office, and not the individual filling it, that the legal interest and cause of action vests."

2d ground. (11 Stat. 269.) Provision is made for filling vacancy by the Board in case of death, removal or refusing to serve. (9 Stat. 604.) Provision is made for appointment of overseer in case of absence. The legislature makes it the duty of the Commissioners to clear the streets. They appoint a warner, an agent, or a special Commissioner to execute it in place of Commissioner of Lesesne, whom, for some reason (good to them) they have excused. Are they so utterly powerless as that the work must languish, rather than hands should be called out by any other agency than his?

3d ground. (Evans' Digest, 25.) Public roads shall be *at least* twenty or thirty feet wide. Does not say they shall never be wider, as discretion may dictate: (Ev. Dig. 47.) The streets of unincorporated villages are clearly under the jurisdiction of Commissioners of Roads. Must they work them only the width of thirty feet, whatever that width may be? A committee appointed by the legislature to locate the village. They mark the streets a reasonable width. The Commissioners had to open them as marked out. The Com-

Columbia, May, 1858.

mittee was appointed to lay off or locate a village. Having done so according to proper butts and boundaries, their authority ceased, and the Commissioners must work the streets.

4th ground of appeal. The Commissioners cannot be expected to measure distance for every individual. They take reasonable means to find out. Let the party aggrieved measure the distance.

5th ground. Default, March 23, 1857. Board met and took up the case second Monday in May. Continued it over to second Monday in August. Process lodged February 5, 1858. .

It is the intent of the law that the action of the Board should take case out of statute. They are required to meet only twice a year. (Ev. Dig. 11.) And "before action brought the amount of the fine must be fixed and ascertained." When the case is once before them they have clearly the power duly to deliberate upon it, and the law will not insist upon a hurried decision if six months shall have almost expired.

7th ground. "Where the subject matter and the person are within the jurisdiction of the Commissioners their decision is final and conclusive, unless they have exceeded their jurisdiction, admitted illegal evidence, or in some way violated the law." (*Price vs. Commissioners*, Ev. Dig. 25.)

Three months notice not necessary. Three months notice only required when they open road of their own authority, or where there is opposition and they petition the legislature. In this case the Commissioners of Location were required to advertise sale of lots three months; this having been complied with, the Commissioners of Roads need not advertise other three months.

The opinion of the Court was delivered by

O'NEALL, J. There is too much diversity of opinion on

Commissioners vs. Durant.

some of the grounds of appeal to justify the Court in pronouncing an opinion upon them. The ground taken in the argument on the third and seventh grounds together, "that the streets of Manning were under a special jurisdiction," and therefore that the Commissioners had no right to call out the inhabitants of the District to work upon them, is that which has obtained an unanimous concurrence.

The second section of the Act of 1855, entitled "An Act to establish Clarendon County as a separate judicial District," (12 Stat. 417,) appointed thirteen gentlemen Commissioners, who, at the expense of the District, were to "select and purchase and contract for a tract of land of not less than six acres nor more than sixty acres; upon which they shall lay out a village to be called the Village of Manning." The power to lay out a village, is the power to lay off the lots and open the streets. For it can only become a village by having places of habitation, and the means of ingress and egress. The Commissioners of Roads had nothing to do with the matter, until the streets were thus opened and dedicated as highways.^(a) Then, if they thought proper, they might accept them as such, and call out the hands to work on them. This, however, was subsequent to the laying them out, which was done at the expense of the District by the gentlemen mentioned in the Act of 1855.

The motion to reverse the decree is granted.

WARDLAW, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion granted.

(a) *State vs. Carter*, 5 Strob. 217.

Columbia, May, 1858,

THE STATE *vs.* PLEASANT A. BROCK.*Trading with Slave—Indictment.*

A distiller, vendor, or retailer of spirituous liquors cannot be indicted under the Act of 1817 for trading with a slave, where the trading consisted of selling spirits to a slave. In such case he can only be indicted under the Act of 1834, for selling spirits to a slave.

To charge one with purchasing ten cents in coin from a slave is no offence.

BEFORE MUNRO, J., AT CHESTERFIELD, SPRING TERM,
1858.

The report of his Honor, the presiding Judge, is as follows :

"The defendant was indicted jointly with his father, Alsy Brock, for trading with Dick, the slave of B. F. Pegues. The trading proved on the trial was the sale of a bottle of spirits to the slave, and for this same act the defendant was at this Term convicted on two other indictments of retailing, and of selling spirits to a slave. In these several indictments, the defendant is described as a "retailer or vendor of spirituous liquors," and was proved to be so. It was objected to a conviction in this case, that so far as trading with a slave by selling him spirituous liquors is concerned, the Act of Assembly, of 1834, in reference to distillers, retailers, and vendors of liquors, repealed the general Act of 1817, and the defendant cannot therefore by the one act of selling the bottle of spirits to the slave, Dick, be guilty of the two distinct offences, to wit, the general one of trading with a slave, prohibited by the Act of 1817, and the specific one of selling spirits to a slave, prohibited by the Act of 1834. Under the conviction that this identical question had been made before the Court of Appeals, and there decided adversely to the defendant's view,

State vs. Brock.

in a case which was carried up from Williamsburg District a few years since, but has not been reported, the objection was overruled, and the defendant was convicted."

The defendant appealed and now moved this Court in arrest of judgment,* on the grounds:

1. That the defendant is indicted "as a vendor and retailer of spirituous liquors," and on the trial of the case was proved so to be—and the act of trading proved is the selling a small quantity of spirits to the slave, Dick, and the Act of 1834, in so far as vendors and retailers of spirituous liquors are concerned, having repealed the Act of 1817, as to any species of trading prohibited by the first mentioned Act, the defendant for selling spirits to a slave is not liable to be indicted under the Act of 1817.

2. That the defendant a shopkeeper, vendor and retailer of spirituous liquors, and so described in the several indictments, for the single act of selling spirits to the slave, Dick, was convicted in three several indictments: 1, for retailing; 2, for selling spirits to a slave; and 3, for trading with a slave; and this, it is submitted, is erroneous.

3. That his Honor ought to have instructed the jury, that for the same single act of selling the spirits to the slave, Dick, the defendant could not legally be guilty of two distinct offences, to wit, of trading with the slave generally, and of the specific trading of selling spirits to the slave.

Inglis, for appellant. The act of selling spirits to a slave, being clearly embraced within the general terms—"deal, trade or traffic with any slave"—was an offence against the Act of 1817, and, as such, punishable by a fine not exceeding one thousand dollars, and imprisonment of from one to twelve months.—7 Stat. 454; *State vs. Sonnerkalb*, 2 N. & M. 280;

Columbia, May, 1858.

State vs. Mugy, cited in *Holman's case*, 3 McC. 306. When the Act of 1834, (7 Stat. 469,) imposed, for this specific kind of trading, when done by "a distiller, vendor or retailer of spirituous liquors," a smaller penalty than that provided by the former Act of 1817, the Act of 1834, as to all cases of trading embraced within its provisions, and, among others, this of selling spirits to a slave, operated as a repeal of the Act of 1817. Every affirmative statute is a repeal by implication of a precedent affirmative statute, so far as it is contrary thereto. *Leges posteriores, priores contrarias abrogant.* 9 Bac. Abr. Tit. Stat. D. 226. When a statute imposes a new penalty for an offence, whether greater or smaller than the former penalty, it repeals, by implication, so much of the former law as establishes a different penalty. Smith's commentaries, Sec. 776; Broom's Leg. Max. 26, "*Leges posteriores*," &c.; *Rex vs. Cator*, 4 Burr. 2026; *Rex vs. Davis*, Leach, 271, (228, 306?); *Henderson, et al., vs. Sherburn*, 2 M. & W. 236; *Attorney-General vs. Lockwood*, 9 Ib. 391; *Lang vs. Spicer*, 1 Ib. 129; *Nichols vs. Squire*, 5 Pick. 168; *Commonwealth vs. Kimball*, 21 Pick. 373. Stealing sheep or hogs was larceny, (grand or petit, according to the value,) at common law, and punishable accordingly. 4 Bl. Com. 236. The Act of Assembly of 1784, and, afterwards, of 1789, affirmed, that any person convicted of stealing a sheep, hog, &c., shall be subject to a fine of five pounds sterling for each sheep, &c., stolen, &c. There are no negative words—not even such as here, "not exceeding,"—no words of express repeal.—May one who steals a sheep be indicted at common law, or under the statute, at the option of the State? Nay, worse! May he be indicted and punished under both? Is the new penalty added to the former? as in the case before the Court? The State never claimed more than an *option*, and was denied that. *State vs. Ripley*, 2 Brev. 300; *State vs. McLain*, Ib. 443. It was a nuisance, at common law, to obstruct a navigable river, a public highway, but see *State*

State vs. Brook.

vs. *Thompson*, 2 Strob. 12. Penal Statutes are to be construed strictly, a rule adopted, out of favor to the personal liberty of the citizen. So say English Judges—see Lord Abinger, in *Henderson, and others, vs. Sherburn*, 2 M. & W. 236. The Act of 1834, expressly declares, that for the act of “selling spirits to a slave,” “a distiller, vendor, &c.,” shall be imprisoned *not exceeding* six months, and fined *not exceeding* one hundred dollars. Yet, by this magical interpretation of a system or series of penal legislation, all directed against the evil of trading with slaves—such “distiller, vendor, &c.,” for such single act of “selling spirits, &c.,” may be imprisoned certainly *eighteen months*, and fined certainly *eleven hundred* dollars. And if, instead of selling the spirits for money, he had taken payment in corn, rice, cotton, &c., it is difficult to see what is to prevent the imprisonment being extended to *thirty* months, and the fine to *twenty-one hundred* dollars. See Act of Assembly, 1834, 6 Stat. 516; *State vs. Priester, Cheves*, 104. In this calculation, we do not include the punishment of the “retailing,” which is involved in the act of selling a bottle of whiskey to the slave. This is an entirely distinct misdemeanor from that of “trading with slaves,” assailing a distinct social interest, and violating a distinct public policy. On this ground, the cases of the *State vs. Sonnerkalb*, 2 N. & M. 280, and the *State vs. Glasgow*, Dud. 40, may perhaps securely rest. But selling spirits to a slave, differs from trading with a slave, only as the species differs from the genus—as the *minor* differs from its *major* in logic. So much for general doctrines. As to their application to the particular case of the statutes now under consideration, see the *State vs. Evans*, 3 Hill, 191; O’Neill, J., in the *State vs. Stone, Rice*, 148; Earle, J., in the *State vs. Priester, Cheves*, 104; Evans, J., in the *State vs. Anderson* 1 Strob. 459.

McIver, solicitor, contra.

Columbia, May, 1858.

CURIA, per O'NEALL, J. The case of the *State vs. Evans*, 3 Hill 190, decided, that the Act of 1817, as to distillers, vendors or retailers, was repealed by the Act of 1834, in so far as they might give, deliver, sell or exchange spirituous liquors to a slave, without the written order of the owner, or person having the care and management of such slave. In that case, the defendant was not described in the indictment as either a distiller, vendor or retailer: the proof however showed that he was a "shopkeeper, and retailer and vendor of spirituous liquors," and it was held by nine out of the ten Judges, that judgment could not be given against him under the Act of 1817—that he was alone liable under the Act of 1834. Here in the second count the defendant with Alsey Brock is described as retailers and vendors of spirituous liquors, and is charged under the Act of 1817—it is clear that he is not liable to judgment under it.

The first count charges what I think is no offence, the purchase of ten cents in coin from a slave. The money is the means whereby a trading for any "article whatever" may be consummated. But it cannot be said, that the shopkeeper, who delivers one pint of whiskey for ten cents, thereby becomes the purchaser of the ten cents in coin.

Let the judgment be arrested.

WARDLAW, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion granted.

Ex parte Williams.

EX PARTE ALBERT WILLIAMS.

*Parent and Child—Infant, Custody of—Habeas Corpus
—Practice.*

Where a father seeks by *habeas corpus* to obtain possession of his infant son, the discretion of the Court in discharging the infant from illegal restraint, is not limited to protecting him in returning, but it may, even where the infant is of the age of choice, order that he be delivered to the father.

BEFORE WHITNER, J., AT RICHLAND, OCTOBER, 1857.

Petition for a writ of *habeas corpus* to be directed to John W. Clark, the grand-father, commanding him to have the body of Alpha Irving Williams, the infants on of the petitioner, before the Court.

The writ was made returnable on the 16th October, on which day, the said John W. Clark having failed and neglected to comply with the requisitions of the writ, it was "ordered, that the said John W. Clark, do forthwith surrender and deliver the body of the said Alpha Irving Williams to the petitioner, Albert Williams, and that in case of his neglect or refusal to do so, the said John W. Clark be attached for contempt in disobeying the order of this Court, and that the sheriff of Richland district do take the body of the said John W. Clark, and commit him to the jail of Richland district, and detain him there until he shall comply with the order of this Court, or be otherwise discharged by competent authority."

The sheriff having made return to the above order, that upon repairing to the house of Mr. Clark, in company with his family physician, he found him in such condition of bodily health, that his removal and confinement would endanger his

Columbia, May, 1858.

life, and therefore he had not acted on the order; it was, on the 21st October, 1857, ordered that the sheriff be excused; and further, that the order be suspended until the 5th December, on which day, Mr. Clark was directed to make his return, with leave to submit such showing as he might then have; and also, with leave to the petitioner to submit a counter showing.

On the 5th December, 1857, the matter was again heard by his Honor, on the return of Mr. Clark, and affidavits submitted on both sides.

His Honor afterwards made the following order:

"At Chambers, Columbia, Dec. 14th, 1857."

"It is not necessary to recite the proceedings had heretofore before me. The further hearing on the day assigned was at the earnest solicitation of the counsel representing John W. Clark, and authorised, as I conceived, by the special circumstances. It appearing, by the further showing of the said John W. Clark, that the infant boy, Alpha Irving Williams, is now in his custody, the parties being before me, by their counsel, additional affidavits were read and counsel fully heard. I availed myself also of the opportunity of a free conference with the son, touching the circumstances leading to this unpleasant controversy, and the views or wishes he might entertain as to his future disposition. The case was then adjourned over for further time to consider and deliver a judgment when the parties might be present.

"I regret that the pressing engagements by which I am surrounded, deny me the opportunity of setting forth in detail the views I entertain of the facts and law of the case, the more especially, if perchance, I might thereby render that judgment more acceptable to the parties.

"To the last hour I had hoped an amicable arrangement might be effected, so that I might be spared the painful necessity of determining the claims set up, or passing upon the rights involved.

Ex parte Williams.

"The youthful subject of this controversy constitutes a remaining link which should serve to bind these contestants in closer friendship. I am oppressed with the reflection that when, as the organ of the law, I make to each party according to its mandates, whether I shall give or withhold, the tie is likely to be severed, and a deeper bitterness may ensue as a consequence of disappointment.

"This is not a controversy between parents standing in equal relation to the subject. The superior right of the father to the custody and control of the son as against any claim to be set up by the grandfather, is beyond question. Why, then, should the claim of the father not be accorded in the present instance?

"I am not affected by any fact made to appear that the trust reposed by law in the father has been or is likely to be abused. I cannot assume that, because discipline has been used that it was cruelly or wantonly administered. The instrument used on a single occasion was unusual, and I would not say strictly defensible. Its use, and to the extent shown, cannot of itself sanction the conclusion sought. The allegiance of the child is due to the parent—obedience to just authority is a duty to be enjoined and enforced, looking to the interest of the child—unless demanded by a sense of humanity, in a clear case, inference by others is indiscreet and pernicious. Weakness in a parent, or mistaken kindness by others, may often prove the greatest cruelty in the end.

"The general character of the parent, as well as his conduct to the boy, as shown by the evidence, is altogether satisfactory. The petitioner is represented as a man of piety, education, prudence, and of sufficient pecuniary resources to maintain creditably, and secure efficiently, the comfort and future education of the son. The sense of responsibility he manifests, I trust, is a guarantee that confidence may be rightfully reposed in him.

"It has been urged, that at most a law judge only has

Columbia, May, 1858.

power to free the child, having attained the age of choice, from any improper restraint on the part of Mr. Clark; but that according to his choice he should be left free from all restraint by any order now made in the premises. I shall certainly not assume to appoint a guardian, but by law, human and divine, the parent is entitled to the control of the child, which implies his possession, and no restraint will be imposed upon its exercise in the present case. When these proceedings shall have closed, I trust there will be no further interference with the exercise of parental authority by Mr. Clark, or any one acting as his agent, or by his authority, unless the proper sanction of law be first had, or at least until a new and well-founded case may arise.

"It is ordered that the said Alpha Irving Williams be surrendered forthwith by his present custodian, John W. Clark, or by such person as may represent him as his agent, on the present occasion, and that the petitioner, Albert Williams, be permitted and have full authority to take possession of his son, and the same to retain according to the powers and privileges which attach to him as father.

"It is further ordered, that if this mandate be not obeyed, or if the said J. W. Clark, or any one acting as his agent, or by his instructions, should attempt to possess himself of the said Alpha Irving Williams, against the will of his father Albert Williams, he may apply to me or another judge of this State, for an attachment against such person for contempt.

"It is further ordered that the original papers in these entire proceedings, be filed by the Clerk of Sessions and Common Pleas, for Richland district."

And on the same day his Honor made the following supplemental order:

"It being suggested and satisfactorily appearing, that the petitioner, Albert Williams, is absent, in consequence of indisposition, but has procured to be present his friend, Judge H. W. Watson, a gentleman known to me of character, as

Ex parte Williams.

his agent in the event of a judgment being given in favor of the present application, by way of avoiding any misunderstanding, I have thought proper thus to recognize his agency as a part of this proceeding, and declare that in my view he may properly represent the father in receiving and retaining the possession of the son, Alpha Irving Williams, for all the purposes of the present proceeding, and this I append to my judgment at the time of announcing it."

John W. Clark appealed, and now moved this Court to reverse the order granted, requiring him to deliver up Alpha Irving Williams, on the grounds:

1. Because under the facts and circumstances as presented, the father was not entitled to the custody of the child.

2. Because there was nothing shown in the case to bring it within the exception made by the decided cases to the well-settled rule, that the father is not entitled, as a matter of right, to an order on the return to a writ of *habeas corpus*, that the possession of the child be delivered to him, but on the contrary, there was everything to show, that while the Court was bound *ex debito justitiæ*, to set the infant free from improper restraint, it ought in its discretion, and looking only to the benefit and welfare of the infant, to have instructed and advised, in the choice he should and would have made, namely: to remain with his grandfather.

Hoadly, for appellant, submitted.

1. That there was no evidence whatever, that Mr. Clark detained Alpha Irving Williams against his will, or that he was unlawfully detained by Mr. Clark, or that he was detained at all.

2. That if the order of the court amounts to a mandate to Mr. Clark to deliver up Alpha I. Williams to his father, it

Columbia, May, 1858.

has not the sanction of law or precedent upon the trial of a *habeas corpus*.

3. That if, upon an application for a *habeas corpus*, such order may be lawfully made, the case made by the applicant does not require the interposition of the court; and is especially unfit where the infant is of the age of choice, and is unwilling to be delivered up to his father, the applicant.

4. That if the court is satisfied upon the case made, that the infant is detained by Mr. Clark, and that it is proper some order should be made, it is respectfully submitted that the order should only be to the effect that the infant be allowed to go where he pleases.

And cited the following authorities to sustain them:

In the matter of *Wolfstonecraft*, an infant, 4 Johns. Ch. 80; *The People vs. Porter*, 1 Duer., 709; 13 Johns. 417; *The People ex rel., Barry vs. Mercim*, 8 Paige, Ch. 47; *Rex vs. Smith*, 2 Stra. 982; *King vs. Clarkson*, 1 Stra. 444; *Rex vs. Johnson*, 1 Stra. 579; *People vs. Pillons*, 1 Sandf. Sup. Ct. R., 672; *People vs. Frazer*, 1 Dudley, Geo. R., 42; *Pool vs. James Goot and wife*, 4th vol. Monthly Law Reporter, No. 5, page 269; In the matter of *Kottman*, 2 Hill, 363; *Ex parte, Schumpert*, 6 Rich. 344.

Tully, contra. The only question is, had the Court authority to make an order for the custody of the infant. That the Court was bound to discharge him from unlawful restraint, is clear and unquestioned law. This is not a matter of discretion but of duty, of clear legal right; but the Court is not bound to stop at that, it may go further, and in its discretion make an order for the custody of the infant. Co. Litt. 88 b., Harg. n. 69; McP. on Inf. 61. The Court will be guided in the exercise of its discretion by the interests of the infant.

De Saussure, in reply.

VOL. XI.—30

Ex parte Williams.

The opinion of the Court was delivered by

WARDLAW, J. In this case it is not denied that the father is a person in every way fit to take charge of his son, the infant in question. Circumstances render the separation of the infant from his aged and respectable grandfather very painful: but the affidavits, which were exhibited to the Judge below and have been read here, satisfy this Court as they did him, that the interest of the infant will not suffer from the separation.

The father lives in Alabama, and now has his son with him there. His right to retain him is unquestionable; and notwithstanding the grounds of the appeal taken by the grandfather seem to deny that under the circumstances the father was entitled to the custody of his child, the argument has gone only to the extent of objecting to so much of the proceedings had below, as has been construed into an order that the body of the infant boy, now fifteen years old, should be delivered by the grandfather into the possession of the father. A decision in favor of the appellant, of the abstract question which has been made, would not restore the boy to the grandfather, nor affect the legal rights of the father: and although we are not able to perceive what other good is expected from it, we are unwilling to believe that it is sought in anticipation of further strife, which might ensue, if possession were again acquired and maintained in opposition to the will of the father.

If delivery to the father of the body of the infant was finally ordered below, (as it had been under the order of October 16, which was suspended October 21,) and was a matter within the discretion of the Judge below, then this Court perceives no reason for dissatisfaction with the exercise of discretion which was made.

According to the oft-recited expressions of Lord Mansfield, in *Rex vs. Delaval*, 3 Burr. 1436, the delivery to the father was within the discretion of the Judge to whom the *habeas*

Columbia, May, 1858.

corpus was returned. In our case of *Kottman*, 2 Hill 364, Chancellor Harper seems to give more weight to the *dicta* in the case of *Rex vs. Smith*, 2 Stra. 982, than Lord Mansfield had done, and, perhaps, to hold that "the *office* of the Court is to discharge the infant from illegal restraint, and the *discretion* is to protect the infant in returning"—. The difference is extremely slight. A Judge, before whom the writ of *habeas corpus* has been returned, finding that the body of an infant has been brought up by a person who does not show a legal right to retain it, is bound to discharge all unlawful restraint. Having done so, he may stop, where the infant has sufficient understanding to choose a protector. If a question as to the validity of a marriage (1 Stra. 444), or the right of guardianship (1 Stra. 579), or the like is involved in the dispute about the possession of such infant, such question will not ordinarily be decided in a summary way by affidavits (2 Stra. 982), but the infant will be left free to exercise a choice, and be protected *redeundo* according to that choice. Even where one party is the father, and his legal right to the possession would, without special circumstances, be clear, if circumstances show that restitution of possession to him would be disadvantageous to the infant, or that his purpose in seeking the possession is in any way evil, the Judge in the exercise of his discretion, may protect the infant *redeundo* in freedom (*Kottman's* case, and others above cited). But where nothing appears to oppose the father's clear right, and the Judge stops after simply discharging the illegal restraint which another had imposed, the order of discharge, as Chancellor Harper has said, amounts only to this, that the father being present may take possession and government of the infant.

It has been urged here that the Judge should inform an infant that is of the age of choice, that he is at liberty to go where he pleases, and that this information, if nothing else be said, is contained in the simple order of discharge. This is

Ex parte Williams.

true, if by liberty of locomotion is meant no more than freedom from illegal restraint. But if by this liberty is meant a protection from lawful control, then the granting of it is an exercise of discretion, which must be warranted by circumstances. An infant is subject to tutelage, and even where possessed of a strong will, is not considered by the law to have discretion for the unrestrained direction of his conduct. A Judge would greatly mislead, and might seriously injure a youth of fifteen, by telling him that he was free to go where he pleased, if room was left for the misconception that he was not bound to obey his father. An infant so told might, if nothing else was said, be seized by the father in the presence of the Judge, and be subjected to such restraint and chastisement as would be necessary for the maintenance of parental authority. A struggle between parties might ensue, and the very illegal restraint from which the infant had just been discharged might be re-established. It is wise and better then for the Judge, when no reason for interfering with the father's right appears, to express what would be implied by the simple order of discharge. That, and no more was done in this case. A full conference between the Judge and the infant took place—the yielding of possession by Mr. Clark was directed: and upon that, the right of the father to take and retain possession, which would have followed by law, was declared, to prevent misapprehension and indecent struggle. The inhibition of attempt on the part of Mr. Clark to regain possession against the will of the father, was no more than the declaration of a purpose to enforce the order, which had been made, discharging the illegal custody and presumed restraint to which the infant had been subjected.

The motion is dismissed.

WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, May, 1858.

JOHN U. INGRAM *vs.* WILLIAM WILSON.*Pleading—Bond, Construction of.*

In an action of debt on a bond for the payment of money, the plea of *non-damnificatus* is bad on general demurrer.

A bond reciting amongst other things that the obligors were willing to indemnify and save harmless the obligee against future liabilities, followed by a condition to pay a certain sum of money in instalments, *held* to be a money bond, and not a bond to indemnify.

BEFORE GLOVER, J., AT KERSHAW, SPRING TERM, 1858.

This was an action of debt on a bond, as follows:

State of South Carolina, Kershaw District.

Know all Men by these Presents, that we, Archelous Payne, William Wilson, and Jane Wilson, of said District, are jointly and severally held, and firmly bound, unto John U. Ingram, in the penal sum of four thousand dollars, to the payment of which well and truly to be made, we bind ourselves jointly and severally, each and every of us, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated the sixth day of September, Anno Domini one thousand eight hundred and forty-eight, and in the seventy-third year of the Independence of the United States of America.

Whereas, the above named John U. Ingram, at our instance and request, has filed his petition in the Court of Equity, (dated 18th August, 1848,) praying to be appointed the committee of the estate and person of Mrs. Rachel Leigh, now residing in

Ingram vs. Wilson.

the said district; and whereas there are many risks and responsibilities incurred and likely to be undertaken by the said Ingram, and we, the undersigned, being next of kin and heirs at law of said Rachel Leigh, being willing to indemnify and save harmless the said Ingram, against any future liabilities, do enter into this bond, and assume this obligation, as an inducement to said Ingram to undertake the duties of said appointment, it being well understood that this bond is to be an addition to, and over and above the regular commissions to which the said Ingram, as committee aforesaid, may be by law entitled.

Now, the condition of the above obligation is such, that the said Archelous Payne, William Wilson, and Jane Wilson, shall well and truly pay to the said Ingram, the sum of two thousand dollars in four equal annual instalments, in the following manner, to wit: the first five hundred dollars, twelve months from the date of the bond which the said Ingram is to give to the Commissioner in Equity upon taking into charge and assuming the management of the said estate, the balance one-third in each year, for three years thereafter. The date of payment in each year to be the same date that the said bond to the Commissioner in Equity bears. Then this obligation to be void and of none effect, or else to remain in full force and virtue.

ARCHELOUS PAYNE. [L.S.]

WILLIAM WILSON. [L.S.]

JANE WILSON. [L.S.]

Signed and sealed in the presence of—

(the name Archelous erased twice, and
the name Archelous interlined twice
before signing and sealing,)

JESSE HORTER.

The defendant craved oyer, set out the condition of the

Columbia, May, 1858.

bond, and pleaded *non-damnificatus*. The plaintiff demurred generally.

His Honor sustained the demurrer and the plaintiff took a verdict in the usual form.

The defendant appealed, on the ground, that the plea of *non-damnificatus* was a proper plea to the bond in question.

Kershaw, for appellant. The condition of the bond is controlled by the recital, *Gyles vs. Vaulk*, 2 Sp. 468. That makes it a bond to indemnify to the amount named in the condition, but continuing only for four years, and to the extent only of five hundred dollars per annum. The losses to be made good without diminishing the regular commissions of the committee.

Shannon, contra.

The opinion of the Court was delivered by

WHITNER, J. The pleadings in the present case involve a question as to the character of the obligation sued on; whether it is to be regarded an indemnity bond or a money bond. Justice is to be done by enforcing the performance of the contract, according to the sense in which the parties mutually understood it at the time it was made, and this is to be ascertained from the terms they have used.

The construction is to be upon the entire agreement and not merely upon disjointed or particular parts. The whole context must be considered in endeavoring to collect the intention of the parties. Every part of the instrument shall if possible be made to take effect. Such are the familiar principles collected by Chitty on Contracts, 73-83, and universally recognized.

The obligatory part of this bond as well as the condition

Ingram vs. Wilson.

are congruous and unequivocal, and amount to an express stipulation to pay a definite sum in annual instalments. Being under seal a consideration is implied and the contract is complete. The recital in this contract, it is insisted, explains and qualifies the stipulation and in fact changes its entire character. This brings us to the subject-matter of the agreement in affixing a meaning to the terms used that our construction may be reasonable and the different parts made consistent if practicable.

The obligee was about to assume the care and management of the person and estate of a lunatic, with the attendant "risks and responsibilities," incident to the trust imposed and secured by a bond on his part—an additional inducement "over and above the regular commissions" was held out to the obligee to undertake this service. The bond in question by the *next of kin* and *heirs at law* of the lunatic with an obligation to pay a definite sum for a specific, hazardous, and responsible service was entered into. The compensation provided by the regular commissions was properly deemed inadequate by the parties, and those interested in the estate and upon whom was cast the moral duty of caring for the person, "assumed this obligation" evidently intended to secure a proper compensation to one who at their instance and request, was thus induced to render the service.

The indemnity spoken of, it must be remembered, is not incorporated in the condition as a thing to be done by the obligors upon a future contingency, when it shall be ascertained that loss has accrued. It is found in the previous recital and in juxtaposition with the other circumstances that constituted the consideration, moving them to an express agreement to pay money. Such a term in the recital that the obligors are "willing to indemnify and save harmless" the obligee is too vague and equivocal to over-ride the express stipulation in the condition. It is controlled by the context. When the condition of a bond is merely to indemnify, this

Columbia, May, 1858.

plea is sufficient, but when the *condition* stipulates to perform any particular act, performance must be specially pleaded.
1 Saund. 116, n. 1.

The motion to overrule the demurrer is dismissed.

O'NEALL, WARDLAW, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Walter vs. Richardson.

W. D. WALTER vs. THOMAS C. RICHARDSON.

Action—Account Current—Payment.

A factor will not be allowed to select one item from his account current and sue upon that alone. He should sue upon the whole account, and claim the balance due at the foot of it.

Where a factor's account current shows that on a certain day there was a balance in his hands due his principal, all previous charges against the principal are extinguished, and if there is a balance due the factor at the foot of the account, it must arise from subsequent transactions, and they constitute his cause of action.

BEFORE GLOVER, J., AT SUMTER, SPRING TERM, 1858.

This was an action of assumpsit for one hundred and twenty-four dollars and thirty-four cents, for bagging and rope furnished by plaintiff, a factor, on the 7th September, 1855, with charges for freight, shipping and drayage. The charges were proved by a witness examined by commission.

The defendant produced an account current which had been furnished him by plaintiff, as follows:

*Mr. T. C. Richardson in Account, and Interest Account, with
W. D. Walter, to 11th February, 1856.*

Dr.

1855.

May 5.	To balance as account rendered,	891 25	Int.	9-6	47 80
Sept. 7.	" invoice of rope and bagging,	124 34	"	5-4	3 72
Nov. 2.	Your draft favor L. B. Hanks, 30 days, payable December 5,	200 00	"	2-6	2 56
Nov. 24.	Cash paid your note in Bank Charleston,	857 00	"	2-18	12 93

1856.

Feb. 11.	To debit balance of interest,	11 83
----------	-------------------------------	-------

2084 52

67 03

Columbia, May, 1858.

				Cr.
1855.				
June 23.	By cash for your note at six mo's,	857 00	Int. 7-10	38 13
Nov. 23.	" proceeds of forty bales cotton,	1106 04	" 2-19	17 07
1856.				
Feb. 11.	" debit balance of interest,			11 83
" 11.	" balance,	121 48		
		<u>2084 52</u>		<u>67 03</u>
1856.				
Feb. 11.	To balance to your debit,	121 48		
	" 2 1-2 for commission on balance,	3 03		
		<u>124 51</u>		

E. E.

Charleston, S. C., Feb. 11, 1856.

W. D. WALTER,
pr. Atty. E. W. Walter.

His Honor having intimated to the plaintiff's attorneys, that the proof of only some of the items in an account current, showing the true balance due, was insufficient to establish the plaintiff's demand, a nonsuit was granted, with leave to move to set it aside.

The plaintiff appealed, and now moved this Court to set aside the nonsuit, on the ground:

Because the account being clearly established, and there being no notice of discount or proof of payment, the plaintiff was entitled to a verdict.

Moses, for appellant. Each item in an account is a separate cause of action, and where a plaintiff has several causes of action, he may waive all but one, and sue on that alone, though it may be that in a second action he could not recover the other charges. It is no objection to the first action, that he has not declared for every thing he had the right to declare for. Plaintiff here might have sued for the whole account, or he might have sued for any part of it. He has sued for but one of the items, and if he recovers, the

Walter vs. Richardson.

judgment may be a bar to a second action for the other items; but it is no objection to the action now brought, that he has not sued for every thing he might have sued for. He cited *Carson vs. Hill & Jones*, 1 McM. 82; *Bates vs. Quattlebum*, 4 McC. 265; 1 Wend. 487; 15 Johns. R. 289; 15 Johns. R. 432; 16 Johns. R. 121; 16 Johns. R. 136; *Seddon vs. Tutop*, 7 T. R. 608; 20 Eng. C. L. R. 466. As to the cotton sold on 23d November, 1855, plaintiff had the right to apply the proceeds as he pleased, and he has applied them to the other items of the account current, leaving the charge for bagging and rope unpaid. The creditor has the right to apply a payment to any one of several demands, where no instructions to the contrary are given.

Spain, Richardson, contra. The defence proceeds upon two grounds. (1.) That the item for bagging and rope furnished on the 7th September, was extinguished or paid on the 23d November, when plaintiff received the proceeds of defendant's cotton—a transaction which left the plaintiff indebted to defendant; and that plaintiff's cause of action arises out of a subsequent transaction. (2.) That if plaintiff has the right to alter his account, and apply the proceeds of the cotton to subsequent transactions, so as to leave the item for bagging and rope unpaid, still he cannot recover; for he should have sued upon the whole account and claimed the general balance. It would be a dangerous practice to allow a merchant or factor to select a single item from his account and sue upon that alone, merely because it is inconvenient for him to produce his books, and because he has a witness who can testify to that transaction from memory. It is not supposed that any wrong was intended in this case; but it is easy enough to conceive that under the cover of such a practice, the grossest frauds might be perpetrated. Where the law allows a party to keep books which are evidence for himself, the relation between him and his customer is to

Columbia, May, 1858.

a certain extent, one of confidence. The customer, when a demand is made upon him, has the right to call for the books, and to inspect his account. The books are evidence as much for the one party as for the other. There may be errors which the customer has the right to have corrected; and whenever he is sued, he has the right to require that the whole account shall be produced, and the books also, that he may point out errors and mistakes, if there be any. Now, if the merchant may sue upon one item, because the amount happens to correspond with the amount due at the bottom of the account, he may sue upon any item, upon one which is ten times the amount of the general balance. There is nothing to prevent him but his own sense of what is right. If he may suppress his books in the one case, and resort to the testimony of a convenient witness to prove his charge, he may do so in the other case, and thus establish a demand ten times the amount he is entitled to. What we insist upon is this, that a merchant claiming from his customer a balance due upon account, and afterwards suing to recover it, must sue upon the whole account, and, if required, produce his books, or, what is equivalent, testimony that goes to the whole matter, otherwise he stands in the position of one who suppresses evidence, and he who suppresses evidence which he is bound to produce, is as bad as he who destroys it.

The opinion of the Court was delivered by

GLOVER, J. The account current furnished by the plaintiff, shows that the true balance due by the defendant, ascertained from various debits and credits, including the rope and bagging, was not one hundred and twenty-four dollars and thirty-four cents. It is only by a singular coincidence that the price of the rope and bagging and the balance so nearly correspond; but if these were identical, the proof of one item of the account does not establish the others. Suppose the difference had been greater, and the balance

Walter vs. Richardson.

actually due by the defendant had been much less than the price of the rope and bagging, would proof of the latter show the true dealings between the parties, and ascertain the correct indebtedness of the defendant? If the plaintiff's cause of action had been the draft in favor of L. B. Hanks, for two hundred dollars, which was subsequent in date to the rope and bagging, the proof of the payment of this draft would establish a liability far exceeding the amount claimed by the plaintiff; and the same result will follow the application of the rule contended for in the selection of any one item, the approximation to the true indebtedness depending upon the amount of the item selected.

The question is not whether a party may sue for a distinct cause of action, but whether on the proof of one item of an account current, furnished by the plaintiff, and exhibiting the whole dealings between the parties, some prior and some subsequent in date to the one proved, he can recover the amount of that item, although it differs from the correct balance ascertained to be due. The real cause of action is the account current, and until evidence is furnished of the debits and credits constituting it, the actual liability cannot be ascertained.

Another objection to the mode of proof insisted upon, will be manifest from an inspection of the debits and credits. On the 23d November, 1855—more than two months after the rope and bagging were furnished—the plaintiff had a balance in his hands to the defendant's credit, of more than seven hundred dollars. Consequently the demand now sued for was then paid, and the indebtedness of the defendant arose from other and subsequent liabilities.

The proof offered was, therefore, insufficient, and the motion to set aside the nonsuit is dismissed.

O'NEALL, WARDLAW, WHITNER and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, May, 1858.

WILSON TRAMMELL vs. DANIEL TRAMMELL.

*Easement—Contract—Frauds, Statute of—Case—
Trespass.*

A right to erect a mill on the land of another is an incorporeal hereditament and an agreement conferring such right must be in writing.

B. agreed by parol to allow A. to erect a mill on his land and to reduce the agreement to writing :—*Held*, that A could not maintain an action on the case against B. for wrongfully refusing to reduce the contract to writing and obstructing him in the use of the mill.

For the wrongful removal of plank from a dam the action must be trespass and not case.

BEFORE WARDLAW, J., AT GREENVILLE, SPRING TERM,
1858.

The report of his Honor, the presiding Judge, is as follows :

“This was an action on the case. I treated it as an ordinary action for obstruction of an easement; but the plaintiff’s counsel had other views of it, which the declaration, grounds of appeal, and argument will explain.

“There are two counts. The first, complains in substance that the defendant was part owner of certain land. He, and his brother, Jeremiah Trammell, the other owner of the land, agreed that the plaintiff should erect a mill on that land, and should have the use of his erections, with all necessary privileges, so long as he chose to keep them up; thereby induced, he built at much expense; the defendant agreed to sign a written contract, but afterwards wrongfully and injuriously refused to sign, and obstructed the plaintiff in his use of the mill.

“The second, complains that the defendant wrongfully

Trammell vs. Trammell.

removed planks from a dam, so as to obstruct the plaintiff in his use of a mill, of which the plaintiff was proprietor.

"The testimony showed that on a small mountain stream, Daniel and Jeremiah, as tenants in common, owned undivided shares of a tract of land. Above that, the defendant, Daniel, owned in severalty another tract; and still higher up, the plaintiff, Wilson, owned a third tract; that, with a view to the common convenience of themselves and the neighborhood, the defendant proposed and urged, and the three brothers agreed, that Wilson should have the privilege of building a mill on the lowest tract, and of keeping it there so long as he pleased, with perhaps, some condition about defendant's spring, which it is not necessary now to notice; that about 1848, the plaintiff, Wilson, built a mill on the lowest tract and a dam on the defendant's tract, near the line, and it was understood that whenever he desired, he should have written evidence of the privilege that had been granted to him; that the mill cost about four hundred dollars, and did a fair business till 1852 or '53, when Wilson and Daniel fell out; that Jeremiah then signed a paper which expressed and confirmed the verbal agreement; but Daniel refused to sign it, and at various times before 1857, (when this suit was commenced,) pulled away boards from the dam, so as to let off the water, and in the end, to destroy much of the custom and value of the mill, and that, although there has been no interference with the dam since the commencement of the suit, the mill has done very little because of its bad condition, the loss of confidence in it, and the establishment of other mills.

"Upon motion, after argument, I granted a non-suit; holding that an easement could not be conveyed without writing; that trespass, not case, was the remedy for an injury done to the plaintiff's possession or right of tenancy; that the doctrines of part performance, and compensation for expenses induced by parol license, belonged to equity, and at law could give no title, even if they might serve as protection against an

Columbia, May, 1858.

action of trespass; and that evil motive and fraudulent purpose could not supply the deficiencies of an agreement which the parties themselves considered to be incomplete without the writing required by the law."

The plaintiff appealed and now moved this Court, to set aside the non-suit, on the grounds:

1. Because it is respectfully submitted, that the action can be maintained on the case made by the plaintiff, when the defendant not only agreed, but urged and induced the defendant to build a mill and dam on his lands, at a considerable expense of time and money, promising as a part of the inducement, that he would give a title in writing for the privilege of using and keeping them up, and not only neglected so to do, but positively refused on request made, and that such case is not within the statute of frauds, but rests on its peculiar circumstances.

2. That this case is distinguished from other cases of parol or unwritten grants of the use of land, from the fact alleged in the declaration, and proved on the trial, of the inducements and persuasion used by the defendant, Daniel Trammell, which were connected with the permission to build a mill and dam on his [defendant's] land.

3. That the privilege or easement given by the plaintiff, was at least good from year to year, without notice to quit, and that the acts of the defendant, suddenly disturbing and hindering the use after inducements had been given to the plaintiff by him to build and have the undisturbed benefit of the mill, rendered the defendant liable to the action of the plaintiff.

4. That although the plaintiff could not hold the premises or easement against the title of the defendant, nevertheless,

Trammell vs. Trammell

the conduct of the defendant, embracing *mala fides* and malfeasance on his part, gave legal grounds for the action.

5. That the violation of an agreement, and promise to make written titles, which promise and agreement induce a party to expend money and labor, under the urgent request of the one making the promise, will justify an action on the case, after refusal to comply, especially where there were acts of *mala fides* or malfeasance connected with the party holding out the inducement.

Townes, for appellant, cited 1 Salk. 10; 19 Eng. C. L. R. 288; 15 Wend. 380; 1 M'C. 543; 10 Wend. 324; 7 Wend. 380.

Elford, contra. Plaintiff claimed an easement under parol agreement. The agreement was void under the Statute of Frauds. *Harris vs. Miller*, 1 Meigs, 158; *Woodworth vs. Sealy*, 11 Illin. 157; *Ellis vs. Bradley*, 4 Johns. 81; 12 Ired. 285; 1 Chand. 118.

The opinion of the Court was delivered by

MUNRO, J. The allegations in the first count in the declaration are, that under a parol agreement with the defendant, and another, who were joint proprietors of a tract of land, the plaintiff erected a mill thereon. That the defendant had agreed to reduce said contract or license into writing, but had afterwards wrongfully and injuriously refused to do so, and obstructed the plaintiff in the use of his mill.

The right to erect a mill on the land of another, is an incorporeal hereditament, and falls directly within the express provisions of the Statute of Frauds, and must therefore be in writing. In 3 Kent, 352, the doctrine is thus stated:—"A claim for an easement, must be founded upon a grant by

Columbia, May, 1858.

deed, or writing, or upon presumption which supposes one, for it is a permanent interest in another's land, with a right at all times to enter and enjoy it."

Of the necessity of some instrument in writing to perfect the right in question, the parties appear to have been fully aware, for it was the defendant's refusal to comply with his promise to reduce it into writing that constitutes the gravamen of the plaintiff's complaint.

Whether the plaintiff would be entitled to redress, in another forum, for having erected a mill on the defendant's land, upon the faith of a parol license, coupled with the assurance that the agreement would be reduced into writing, and the defendant's subsequent refusal so to do, is a matter about which we express no opinion—it being sufficient for us to say, that we know of no form of action by which adequate redress can be afforded for such a wrong in a Court of Law.

Nor can we perceive that the matters complained of in the second count are less liable to objection; with this difference however,—that although they do exhibit a valid cause of action, and proper to be redressed by a Court of Law; it is nevertheless obvious, that the form of action has been entirely misconceived. The wrongful removal of plank *for a dam—which is the matter complained of—although furnishing good ground for an action of trespass *vi et armis*, can hardly be redressed by an action on the case, the appropriate function of which is, the redress of injuries that are indirect and consequential—not such as are direct and immediate.

We are therefore satisfied that the non-suit was properly granted on circuit, and that the motion to set it aside must be dismissed—and it is so ordered. ✓

O'NEALL, WARDLAW, WHITNER, and GLOVER, JJ., concurred.

Motion dismissed.

* From.

Haynsworth vs. Frierson.

W. F. B. HAYNSWORTH vs. THOMAS D. FRIERSON.

*Executors and Administrators—Administration—Assets
—Sheriff.*

An administrator cannot maintain an action against a sheriff for the proceeds of chattels sold under an execution against the intestate lodged in his lifetime, even though there be no other assets, and there are funeral and other expenses of the last illness unpaid.

BEFORE GLOVER, J., AT SUMTER, SPRING TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"The plaintiff, Commissioner in Equity for Sumter District, claims, under authority in the nature of letters *ad bona colligenda*, under the hand and seal of the Ordinary of Sumter District, issued under the Derelict Estates Act of 1857, the sum of eighty-two dollars and thirty-two cents from the defendant, the sheriff of Sumter District.

"Samuel J. Wesberry died intestate, some time in 1857. There was at the time of his death a judgment in favor of E. W. Bonney, against him, the *fi. fa.* upon which was in the sheriff's hands. After the death of Wesberry, the sheriff levied upon the chattels of the intestate, which he afterwards sold. No administration having been taken out on Wesberry's estate, letters as above stated were granted to the plaintiff after the levy and before the sale. Notice was given to the sheriff of the plaintiff's claim, to wit: that the proceeds of sale, amounting to eighty-two dollars and thirty-two cents be paid to him, to be retained by him, as provided for by the Derelict Law, until administration should be granted on said estate.

Columbia, May, 1858.

"The sheriff refusing to pay over the said money, this action was brought to recover it.

"It is admitted that there are claims for expenses of the intestate during his last illness. A non-suit was ordered."

The plaintiff appealed and now moved this Court that the non-suit be set aside, on the ground:

That by the Act of 1780, sec. 26, 5 Stat. 111, debts due by an intestate, are arranged in certain degrees or classes—judgments and executions being postponed to funeral and other expenses of the last sickness, charges of letters of administration and debts due to the public, that all the personal property of the intestate is assets in the hands of the administrator for the payment of the intestate's debts in the order fixed by the said Act: that such payment would in this case be defeated if the sheriff be allowed to appropriate the sum in his hands towards the satisfaction of the execution in his office to the exclusion of preferred debts—that, therefore, the plaintiff is entitled to recover from the sheriff the said sum of money, and retain the same, as the custodian appointed by law, until an administrator be appointed, who can administer the estate, and with the assets pay the debts of the intestate, according to their priority as by law established.

W. F. B. Haynsworth, for appellant.

Blanding, contra.

The opinion of the Court was delivered by

WARDLAW, J. Let it be considered that the plaintiff has all the rights, which would pertain to him if ordinary letters of administration on the estate of S. J. Wesberry had been granted to him, after the levy and before the sale by the sheriff; and further that the visible effects, which have been

Haynesworth vs. Frierson.

sold by the sheriff, constituted the whole of the said estate. It must also on the other hand, be understood, as was admitted in argument, although it seems doubtful in the report, that no notice of the plaintiff's claim was given to the sheriff before the sale.

Several cases in our Court of Equity (*Rutledge vs. Rutledge*, 1 McC. Ch. 471; *Keckly vs. Keckly*, 2 Hill, Ch. 257) seem to have declared that the order for payment of debts by an executor or administrator, which is prescribed by the Act of 1789 (5 Stat. 111, § 26) refers only to such assets in the hands of an executor or administrator, as remain after satisfaction of the liens which existed at the death of the testator or intestate. These cases rest mainly upon two earlier cases in that Court—viz.: first, *The Commissioner vs. Greenwood*, 1 Des. 452, 600, where the levy had been made in the debtor's lifetime, and there was neither executor nor administrator; and second, *Brown vs. Gilliland*, 3 Des. 542, where it seems to have been conceded that a slave sold by an executor, under an order from the Ordinary, was, in the hands of the purchaser liable to the lien of a *fi. fa.* against the testator, which was lodged in his lifetime. (See 2 Rich. Eq. 254, 258.)

It may be that in a far stronger case than the plaintiff now presents, debts which in the prescribed order have precedence of executions, would be obliged to yield to general liens that had effect at the death of a testator or intestate; and I do not pretend to know whether the Court of Equity would in any case maintain the priority of "funeral and other expenses of the last sickness" over an execution, nor, if it would, what would be the mode of proceeding. But I know that a sheriff is bound under the exigency of a *fi. fa.* to make and pay over money without delay, and I would not listen to an excuse for his neglect of the duty to pay what he had made, urged upon the ground that an administrator demanded the money and said that funeral expenses had not been paid. In some other way, and not by action against the sheriff for proceeds

Columbia, May, 1888.

of a sale under execution, must the administrator or the person who paid the funeral expenses, present his claim, if he would render it plausible.

In our case of *Salvo & Wade vs. Schmidt*, 2 Spear, 512, whilst a landlord, who took goods under a distress warrant, issued before the death of the tenant, but levied after, was held answerable as *executor de son tort* for the funeral expenses, the argument distinguishes between a distress warrant which does not have a lien, and a *fi. fa.*, which has, but admits that the case might have been different if there had been a levy under the warrant before the death of the tenant.

The motion is dismissed.

O'NEALL, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

Union Bank *vs.* Hodges & Smith.

UNION BANK (OF GA.) *vs.* HODGES & SMITH.

Pleading—Former Recovery—Copartners.

A recovery against two partners, where there are more, is no bar to a subsequent suit against all the partners on the same cause of action.

BEFORE WARDLAW, J., AT ABBEVILLE, SPRING TERM,
1858.

This was an action of assumpsit on a promissory note signed "Hodges & Smith" payable sixty days after date to their own order and endorsed by "Hodges & Smith" to the plaintiff. The defendants were Elihu Hodges, Isaac Smith, and Robert Smith, and they were sued as partners in trade under the style of Hodges & Smith. The pleas were the general issue and a former recovery against two of the defendants.

It appeared that Elihu Hodges and Isaac Smith as ostensible partners, conducted a grocery business in Hamburg, that against them the plaintiff recovered judgment on the note sued on in this action, at Edgefield, in April, 1853; and that the purpose of the present action was to make Robert Smith also liable, who was alleged to have been one of the partners of the firm of Hodges & Smith.

His Honor held that the former recovery barred another action upon the note; and the plaintiff having no evidence besides the note itself, to sustain any of his counts, a verdict was rendered for the defendants.

The plaintiff appealed and now moved this Court for a new trial on the grounds

Columbia, May, 1858.

1. Because his Honor erred in holding that a former recovery of judgment against two partners, without satisfaction, was, as a plea a bar, and as evidence, conclusive in a suit against all the partners, by the same plaintiff for the same cause of action.

2. Because in the present action there is a count in the declaration, charging the defendants as acceptors of a bill of exchange, a count for money loaned and advanced, a count on an account stated, and a count for interest for forbearance of money lent and advanced; and his Honor erred in holding that the bill or note itself, the subject of the former recovery, was not evidence competent to go to the jury in support of said counts.

3. Because the bill or note was not itself the debt, but merely the evidence of it; and his Honor erred in holding that judgment on the note against two of the partners, was an extinguishment of the original debt or cause of action against all the partners.

Wilson, for appellant. A judgment or former recovery is a good plea in bar only in a suit between the same parties, and for the same cause of action. It is no bar, nor is it evidence for or against a stranger to the former record.—1 Phil. Ev. 321, 326, 327, *Cowan & Hill's Notes*, page 818, note 571; *Hurst vs. McNeil*, 1 Wash. C. C. 70, 75; *Meachern vs. Cochran*, 1 M'C. 338; *Treasurers vs. Bates*, 2 Bail. 382. Plea of former recovery against *one* of several joint trespassers, or joint contractors without averment of satisfaction, is no bar to a suit against *another* for the same cause of action. Nor is it a bar to a suit against all the joint trespassers or contractors; and it is immaterial whether the contract be joint and several or joint only. *Hawkins vs. Hatton*, 1 N. & M'C. 318, 319; *Park vs. Hopkins*, 2 Bail. 411; *Treasurers vs. Bates*, Ib., 382;

 Union Bank vs. Hodges & Smith.

Collins vs. Lemasters & Lee, 1 Bail. 348 to 353; *Watson, Crews & Co., vs. Owen & Co.*, 1 Rich. 111, 114; *Livingston vs. Bishop*, 1 Johns. R. 290, 293; *Sheehy vs. Mandeville & Jamison*, 6 Cranch, 254 to 266; Comyn's Digest, Action (L. 4.); Yelv. 67; Cro. Jac., 74. All contracts by partners are joint and several. *Rice vs. Shute*, 5 Bur. 2613, 2614; *Watson Partn.*, 436; *Tooke vs. Bennet*, 3 Cain's Rep., 4; *Brown vs. Belches*, 1 Wash. Rep. 8; *Ayrey vs. Davenport*, 5 Bos. & Pul., 475. *Sed vide contra*: *Collyer Partn.* Sec. 757 and note 3; *King vs. Hore*, 13 Mees. & W., 494; *Trafton vs. Kearney*, 5 Hill, (N. Y.) 86; *Robertson vs. Smith*, 18 Johns R. 481. A promissory note unless given and accepted as satisfaction, does not extinguish an open account. If the note does not extinguish the account, neither does the judgment on the note. *Watson, Crews & Co., vs. Owens & Co.*, 1 Rich. 112; *Dogan vs. Ashby*, 1 Rich. 36; *Chastain vs. Johnson*, 2 Bail. 674; *Barelli, Torre & Co., vs. Brown & Moses*, 1 McC. 449; *Costello vs. Cave & Bradley*, 2 Hill, 529; *Hughes vs. Wheeler*, 8 Cowen, 77, 84. A promissory note by defendant to the plaintiff is evidence under the count for money lent. The note imports that the maker has so much money of the payee in his hands. 2 Stark. Ev. 79; *Harris vs. Huntbach*, 1 Bur. 374, 375; *Story vs. Atkins*, 2 Stra. 720, 725; *Matthews vs. Fogg*, 1 Rich. 369, 372, and note (a) 373; *Haviland, Risley & Co., vs. Simons*, 4 Rich. 338, 342; *Hughes vs. Wheeler*, 8 Cowen, 77, 84; *Israel vs. Douglass*, 1 H. Bl. 239. He further cited 1 Ch. Pl. 546, 556, 566; 1 Stra. 509; 1 Dev. Eq. 466.

McGowan, contra, cited and relied upon *King vs. Hoar*, 13 Mees. & W. 494, which directly decided the question in this case; *Ward vs. Johnson*, 13 Mass. 148; 11 Gill. & J. 11; 9 S. & R. 142; 4 Johns. Ch. 560; 5 Wend. 240; 2 McM. 348; 5 Hill, N. Y. 83.

The opinion of the Court was delivered by

O'NEALL, J. It may be conceded that the plea in England,

Columbia, May, 1858.

Massachusetts, and perhaps other States of this Union, would be held good; *King and another vs. Hoar*, 13 Mees. & Welsby, 493: still it by no means follows that such must be the decision *here*. What have been the decisions in this State? Beginning with *Collins vs. Lemasters and Lee*, 1 Bail. 348, the decisions have been uniform, that on a joint contract a plea by one defendant of a former recovery on the same, against his co-defendant, without satisfaction, is no bar. In the *Treasurers vs. Bates*, 2 Bail. 382, the sheriff had confessed judgments, and these were set up as defences in favor of himself and sureties in a joint action on his official bond. In that case it was said, "it is well settled, that if one joint contractor is sued separately and a recovery had, and he is afterwards sued jointly with the others, he alone against whom the recovery was had can plead it in bar, and that the others have no right to make the objection if he does not choose to rely on it. *Sheehy vs. Mandeville and Jamieson*, 6 Cranch, 253; *Collins vs. Lemasters and Lee*, 1 Bail. 348. Neither of these cases, however, decide that it would be a good plea in bar for the defendant, against whom the recovery was had, in a joint action against all the contractors. I am satisfied it would not. For if it was, the party could never recover at all against the others. He must recover in a joint action on a joint contract against all the parties or none, except in the case of a certificated bankrupt, insolvent debtor, and perhaps an infant. Hence if the plea were good for one it must be for all: and we have already seen the others cannot plead it. The judgment against one of several joint contractors, is a nullity; it may be arrested at any time before execution." These *dicta*, though not necessary for the decision of the case, had the concurrence of the whole Appeal Court, Johnson, Harper, and myself. For the *Treasurers vs. Bates*, was regarded as so important as a leading case, that it was deemed advisable that the opinion should be prepared and read over in consultation, so that every position contained in

Union Bank vs. Hodges & Smith.

it should have the concurrence of each and all the members of the Court. This was done, and the opinion is therefore to be considered as having in every word the concurrence of each and all.

In the case of *Watson Crews & Co. vs. Owens & Co.*, 1 Rich. 111, it was held that a recovery on the note of one of the partners was no bar to an action brought for goods, wares and merchandize, for which the note was given against the said partner and the then dormant partners. When to this array of authority is added, *Sheehy vs. Mandeville and Jamieson*, 6 Cranch, 253, in which C. J. Marshall ruled that a recovery against one could not be set up as a bar to protect both sued on the joint contract, there would seem to be no reason why we should defer to cases decided subsequently in England and elsewhere.

I concur very much in what was so strongly said by Mr. Wilson, the counsel for the plaintiff, a decision sustaining such a plea would be directly favoring fraud. The dormant partner is most commonly unknown to all, except his partners. If they be insolvent, as is said to be the case *here*, they would have nothing to do (if the decision were that the plea was good) but be silent, let judgment go against them, and their friend, the dormant partner, would escape all liability. If, however, they should be solvent, then they could plead the non-joinder of the dormant partner, and turn the plaintiff over to a new writ. Thus they would have all the advantages without sharing any of the perils. It is the duty of the ostensible partners to plead the non-joinder; if they do not, a recovery against them should be treated as a recovery on a several contract, and not as a bar in favor of the dormant partner. I think the plea should have been overruled.

The motion for a new trial is granted.

WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion granted.

Columbia, May, 1858.

THE STATE, EX RE GEO. STONE AND OTHERS *vs.* THE COMMISSIONERS OF ROADS.*Road Law—Jurisdiction of Commissioners of Roads—Alterations.*

The Commissioners of Roads have the power to make alterations in the public roads ; and a deviation for one mile *held* to be such an alteration as they have power to make.

BEFORE WARDLAW, J., AT ANDERSON, SPRING TERM,
1858.

Rule on the Commissioners of Roads of the forty-second regiment of South Carolina Militia, requiring them to show cause why a mandamus should not issue to compel them to restore the old road and highway leading from Anderson Court House to Greenville Court House, as recently obstructed and discontinued, under their authority, near the residence of Col. Wm. S. Pickens.

It appeared, at the return of the rule, that the alteration had been made on the land of W. S. Pickens, and at his instance ; that the new part, about one mile in length, was somewhat longer than the old, and that the Board, after due advertisement, and after hearing petitions on both sides, had adopted the alteration, believing that it was for the public good.

Affidavits, both for and against the motion, were submitted.

His Honor overruled the motion for a mandamus, and the relators appealed.

State vs. Commissioners of Roads.

Reed, for appellants, cited Act 1831, 9 Stat. 590; Act 1825, 9 Stat. 559; *State vs. Broyles*, 1 Bail. 134; *Maddox vs. Ware*, 2 Bail. 316; *State vs. Commissioners*, 4 McC. 5; *Price vs. Commissioners*, 3 Hill, 314; 10 Rich. 303; Tap. on Man. 75.

McGowan, contra. The Commissioners had the power to do what they have done; and that is an end of the matter. This Court cannot review their decision, and say that they acted unwisely—that the alteration was not for the public good. Their judgment concludes the matter. If they have done wrong, they alone can correct it.] *Commissioners vs. Murray*, 1 Rich. 335.

The opinion of the Court was delivered by

GLOVER, J. A single question is involved in all the grounds of appeal, and the answer to that depends upon the powers vested in the Commissioners of Roads to make alterations in the public highways under their jurisdiction.

The positions taken are: 1st, that the Commissioners have no such power; and 2d, that, conceding the power, it is confined to slight changes to avoid obstacles, and without prejudice to the public. Two cases are relied upon by the appellant's counsel, in support of the second proposition, which directly controvert the first. (*Maddox vs. Ware*, 2 Bail. 316, and *The State vs. Commissioners of Roads*, 4 McC. 5.) In both cases it was held, that the Board of Commissioners had the authority to alter or change the established roads, and certain limitations to the exercise of this authority are prescribed: "Slight alterations in the direction of old roads for the *bona fide* purpose of avoiding obstacles and remedying defects,"—"particularly when the alteration is at the request of the individual over whose land the road runs, and where it is productive of no great inconvenience." It is necessary that such power should be conferred on those charged with

Columbia, May, 1858.

the duty of superintending and keeping in repair the highways of the country. If no deviation be allowed from the original road bed, serious inconvenience to the public would result from obstacles, injudicious locations, &c., which admit of an easy remedy by short deflections from the main track ; on the other hand, such alterations are proper where they are made at the request of the owner over whose land the road runs: provided the public receive no detriment from the change. The public good is paramount, but private interests should not be sacrificed to it without manifest necessity ; and as far as the one or the other is involved in the highways, no fear of their invasion can be reasonably indulged from the abuse of the guarded powers vested in the Commissioners of Roads.

The complaint of the relators is, that the change was made for the accommodation of an individual, against the wishes of those interested in the use of the way, and that the change is not slight, but, in effect, the opening of a new road. If no inconvenience results to the public from a mere change which promotes the interest of the freeholder, a continuance of the old line, because it accommodates an individual, would be a perverse and unreasonable exercise of power. The deviation in this case is more than one mile, and that, it is argued, is neither slight nor for a short distance, and we are referred to lexicographers for a definition of the terms employed. We prefer the authority of the case of the *Commissioners of Roads vs. Murray* (1 Rich. 335), where the alteration was greater; and the language of the Court is, "The power of the Board to make alterations in a road cannot well be doubted. It is not making a new road, it is only the making of such alterations and deviations in a road already existing, as, in their judgment, the public interest may require. This must be done in good faith, and not under the pretence of alteration to make a new road." Changes made in an extended line of road may be inconsiderable, which in one of limited extent

State vs. Commissioners of Roads.

would be important. But the expediency and extent of the change must be submitted to the decision of the Board of Commissioners, in whom the authority is vested to make alterations, and we will not presume that the defendants intended, under the pretence of a change in the road, to evade the law. We rather presume that they complied with what the law requires, and decided after a full and an impartial consideration, and the evidence authorizes this presumption. It is probable that a majority of the travelling public believe the alteration improper, but we are of opinion that it is generally safer, in such questions, to rely on the judgment of those tribunals charged with the decision of them, than on democratic majorities.

This conclusion makes it unnecessary to decide whether the relators can, by mandamus, compel the Commissioners to restore the old road.

Motion dismissed.

O'NEALL, WARDLAW, WHITNER, and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, May, 1858.

THOMAS CURRY and WIFE and others *vs.* JOHN S. SIMS and
MATILDA JETER.

*Wills and Testaments—Limitation of Estates—Executory
Devise.*

Testator devised land "to F. L., widow of C. L., deceased, and if it should happen, that said F. L. should die without heirs, lawful begotten of her body, that then the said land shall descend to her sister J.'s children, in common."—*Held*, that F. L. took a fee-simple estate in the land—and that the limitation to J.'s children was void for remoteness.

BEFORE O'NEALL, J., AT UNION, FALL TERM, 1857.

George Linam, by his will, dated in 1815, devised as follows: "I give to Frances Linam, widow of Charles Linam, deceased, the one-half of certain tracts or parcels of land," (describing them) "and if it should happen that the said Frances Liman should die without heirs, lawful begotten of her body, that then the said land shall descend to her sister Judith's children, in common."

Frances Linam intermarried with Nathaniel Rochester, and after the death of testator, she and her husband conveyed the land to H. D. Vanlew, who conveyed to the defendants.

Frances Rochester died in 1846, leaving no children surviving her; and this action of trespass to try title was brought by the children of her sister Judith, who claimed the land under the executory limitations of George Linam's will.

His Honor held that the limitation was good and the plaintiff had a verdict.

The defendants appealed.

Thomson, for appellants, cited *Buist vs. Dawes*, 4 Rich. Eq. 421; *Lyon & Norwood vs. Walker*, 8 Rich. 307; 4 Kent, 10;

Curry vs. Sims and Jeter.

Jones vs. Postell, Harp. 92; *Addison vs. Addison*, 9 Rich. Eq. 58; Bail. Eq. 48; *Scanlan vs. Porter*, 1 Bail. 427; 4 McC. 439; 4 Kent, 541 note e.; Rich. Eq. Cases, 419.

Gadberry, contra, cited 4 Des. 330; 1 McC. Ch. 60; 2 Bro. C. R. 507; 5 Rich. Eq. 525; 1 Strob. 132.

The opinion of the Court was delivered by

WARDLAW, J. The Act of 1853, (12 Stat. 298,) is inapplicable to this case, for the testator here died before that Act was passed. In case of great doubt the expression of the legislative desire might incline the balance, but neither did the Legislature intend to give, nor could the Court constitutionally give a retro active operation to the Act. The hope that such cases will be prevented by the Act from troubling the Court so frequently hereafter, as they have heretofore done, as well as the ample discussions given to the subject in cases to be found in our reports, render any enlarged observations upon this case unnecessary;—but they have not prevented its careful examination. Referring to *Carr vs. Porter*, 1 McC. Ch. 60; *Mazyck vs. Vanderhorst*, Bail. Eq. 48, and the many cases which may be found cited in those, we merely express now our unhesitating opinion, that Frances Linam took in the land in question a fee-simple, which the testator desired to make subject to an executory devise:—that the contingency upon which the executory devise was made to depend was the indefinite failure of the heirs of her body: that such contingency is too remote, as it may not have happened within the prescribed period of a life or lives in being and twenty-one years afterwards: and of course that the fee devised to her was absolute.

The only circumstances suggested to restrain the generality of the expression “die without heirs of her body,” are first, that the limitation over was to persons *in esse*, (if indeed “her sister Judith’s children” were *in esse* at the making of he will or even at Frances’s death)—and, second, that the

Columbia, May, 1888.

land was to "*descend*" to them *in common*. These circumstances were considered in *Lyon vs. Norwood*, 8 Rich. 307, and the first and most material of them in *Carr vs. Porter*: and in these cases and others to which they refer, were held insufficient.

. It appears to the Court that the plaintiffs have shown no title to the land in question; and the verdict is set aside, and a new trial ordered.

Motion granted.

GLOVER and MUNRO, JJ., concurred.

O'NEALL, J., dissenting, said:—I think now, as I did on the circuit, that the executory devise to the plaintiffs is good. The devise to Frances Linam is a fee defeasible. For the Act of 1824 dispenses with words of inheritance, or perpetuity: and the fee is defeasible on dying "without heirs lawful begotten" of her body. *Bedon vs. Bedon*, 2 Bail. 251. The devise over is, "*that then the said land shall descend to her sister Judith's children, in common.*" The question is, "is this limitation too remote?" It is strange after the Legislature in 1853 have established as a canon of construction in all future wills "that where an estate shall be limited to take effect on the death of any person without heirs of the body or issue, or issue of the body, or other equivalent words, such words shall not be construed to mean an indefinite failure of issue, but a failure at the time of the death of such person," 12 Stat. 299, the Courts should still by strained construction defeat the manifest intention of the testator. After such an expression of the public will, it seems to me it would be well to conform to it, in every case where it is possible. I had occasion to say in *Buist vs. Dawes*, 4 Rich. Eq. 425, that the rule in Shelly's case was virtually abolished by the Act of 1824. It seems to me it ought long ago to have been ruled to be inapplicable to our institutions of property. In England it was made to subserve the intent of the testator: *here to vici-*

Curry vs. Sims and Jeter.

late it. Hence it ought here to have been rejected in the very beginning. Fortunately the Act of 1824 has put it altogether out of the way. Mr. Fearn in his excellent work on Contingent Remainders and Executory Devises, (437,) says, that "the law appears now to be settled, that an executory devise of a real or personal estate, which must in the nature of the limitation, vest within twenty-one years after the period of a life in being, is good." I know very well, that the same author tells us at 444, "that an executory devise after a dying without heirs or without issue is void, because too remote." But the two principles are intended to operate together, and whenever it can be shown, that the words used do not mean an indefinite failure of issue, but a failure within the previous rule, the executory devise over is good. The words dying "without lawful heirs, lawful begotten of her body" in the connection in which they are used do not import an indefinite failure of issue. For the tenants who are to take are the children of Judith, and must be *in esse* within the life of Judith, who was *in esse* at the execution of the will. A limitation over after heirs of the body without qualification would be too remote: and I never intended to advance any other doctrine, in *Buist vs. Dawes*, 4 Rich. Eq. 425, and the sixth Judge who gave in his adhesion to the decision in that case, excepted to what he supposed to be the President's ruling, that, "an executory devise to take effect upon an event clearly within the prescribed time, may not be limited upon a fee conditional." This principle so carefully guarded in that case is now to be violated in this. For who can doubt that the executory devise over in this case, is clearly within the prescribed time?

But it is useless to pursue this matter further. In the course of another generation it may get rid of some of the rules, whereby the intentions of testators have been defeated for the last fifty years in this State.

Motion granted.

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Columbia, May, 1858.

P. H. HAMMARSKOLD vs. WILLIAM I. BULL, ET AL.

Public Agents—Pleading—Evidence—Contract.

Declaration in assumpsit against A., B. and others, styled them "Chairman and Commissioners of the New State Capitol," and the bill of particulars, filed with the declaration, set forth charges for work done for the State:—*Held*, that the defendants were sued as public agents, and as such were not liable; and, even if sued as individuals, still, upon the pleadings and the evidence, they were not liable, no special contract, or special circumstances, being alleged or shown, which subjected them to personal liability.

Where public agents are sought to be made liable as private individuals upon a contract made for the public benefit, the declaration should set out the special circumstances, as that they had exceeded their authority or had a fund with which to pay the plaintiff, upon which it is sought to make them liable, or the plaintiff cannot recover.

Where several defendants are sued upon a joint contract the proof must show a joint contract by all, or the plaintiff must fail.

BEFORE GLOVER, J., AT RICHLAND, SPRING TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"The action was assumpsit brought by the plaintiff against William I. Bull, John L. Manning, Richard S. Bedon, Thomas J. Goodwn, Benjamin F. Hunt, Charles McKay, J. Harleston Read, Junior, and Thomas M. Wagner, designated in the writ, 'Chairman and Commissioners for the New State Capitol.' The declaration, after reciting the writ, alleges in the several counts that 'the said defendants' being indebted, &c.

"As the evidence was voluminous, only so much will be reported as may be necessary in considering the plaintiff's motion to set aside the non-suit.

"The General Assembly in 1850 appointed William I.

Hammariskold vs. Bull.

Bull, R. S. Bedon, John Wilson, T. M. Wagner, L. M. Keitt and B. F. Hunt, of the special joint committee on the State House and grounds. Five thousand dollars were appropriated this year for repairs to the State House, and a report of the committee was adopted recommending the erection of 'a Fire Proof Building,' and that the proceeds of the sale of town lots in Columbia be transferred to the Committee.

"December, 1851, the following resolution was adopted: '*Resolved*, That a Committee of eight persons, three to be selected by the President of the Senate, and five by the Speaker of the House, be appointed to take charge of the Fire Proof Building now under construction, in the room of the special joint committee whose term of service will expire.' William I. Bull, R. S. Bedon and James Gregg, were appointed on the part of the Senate, but it does not appear that the House made any appointment. 'The special joint committee on the State House and grounds,' in December, 1851, state that they had determined to erect the Fire Proof Building 'as the part of a plan which might be used as a State House,' and that they had, 'before commencing operations, employed a skilful architect to furnish a general plan of a complete building, and also of the part (namely the north wing) now to be built.' Another appropriation was also made this year. The 1st October, 1851, plaintiff received four hundred dollars, which is a credit in his bill of particulars, and is the first evidence of his connexion with the work as an architect, or otherwise.

"In December, 1852, William I. Bull, Richard S. Bedon and Thomas J. Goodwyn, on the part of the Senate, and Thomas M. Wagner, B. F. Hunt and L. M. Keitt, on the part of the House, were appointed of a special joint committee on the State House and grounds, and about the same time the Senate appointed Professor Williams 'on the committee on the fire proof building' in the place of James Gregg, deceased. December 13, 'the committee on the State House and grounds

Columbia, May, 1858.

to whom was referred the report of the Commissioners of the Fire Proof Building,' reported, and recommended an appropriation of \$50,000 'towards the completion of the Fire Proof Building now under construction; and also for the commencement of the next section, intended for a State Capitol,' to be built according to the plans of P. H. Hammarskold, submitted to the last Legislature—and that the Commissioners are hereby authorized to contract for the same.' Agreeably to this recommendation \$50,000 were appropriated subject to the order of the Commissioners. The only evidence offered, shewing that the defendants J. Harleston Read, Junior, and John L. Manning, were Commissioners, is found in the Minutes of the Commissioners' proceedings. At a meeting held, 9th December, 1852, William I. Bull was in the chair, and R. S. Bedon, T. J. Goodwyn, B. F. Hunt, J. Harleston Read, Jr., and L. M. Keitt, were present, when it was resolved, 'that the Commissioners report their accounts and proceedings, and apply for an appropriation of \$50,000 for the prosecution of the Fire Proof Building.' 'At a meeting of the Commissioners of the New State Capitol,' March, 1853, William I. Bull, J. L. Manning, T. M. Wagner, L. M. Keitt, present, it was agreed to pay certain sums specified for the foundation, &c., of 'the New State Capitol according to instructions by the architect.'

"1853, December. Thomas F. Drayton was appointed by the Senate 'a Commissioner of the New State Capitol,' in the place of Professor Williams and Charles F. McKay, was appointed by the House in the place of L. M. Keitt. At the annual session of the General Assembly, this year, the Governor was directed to issue bonds for \$250,000 which was appropriated on the recommendation of 'the Commissioners of the New State Capitol.'

"1854. At meetings of 'the Commissioners of the New State Capitol' in January and February, and on 26th May, (when the plaintiff was dismissed) William I. Bull, Chairman,

Hammaraskold vs. Bull.

and Bedon, Drayton, Goodwyn, McKay, Manning, Hunt and Wagner, were present; but all were not at each meeting. The report of a special joint committee, made December 21, 1854, on the Governor's Message, Hammaraskold's memorial, &c., among other things states, that 'To Mr. Hammaraskold was allowed five per cent. on all amounts of money expended by the Commissioners for work done under his supervision and direction—and he was to discharge all the duties of an architect according to the custom and obligations of architects dealing with private persons, and was liable to be dismissed at any time, at the pleasure of the Commissioners. This was the contract with Mr. Hammaraskold, the only evidence of which is to be found in the recorded resolution of the Commissioners, and in the reports and written communications of Mr. Hammaraskold. At a meeting of the Commissioners of the New State Capitol, the 21st October, 1853, William I. Bull, T. J. Goodwin, R. S. Bedon, B. F. Hunt, and J. Harleston Read, Jr., being present, it was resolved, 'that Mr. Hammaraskold, as architect for the construction of the New Capitol, including the wing now under construction, received his appointment under this Board; that he bears the same relation to them that he would to a private individual, subject at all times to obey the decision of the commissioners, and also to obey any such suspension of the work as the Chairman may, in writing direct, until the matter suspended may be brought before a meeting of the Commissioners.'

"It was resolved to accept the iron windows furnished by Mr. Hammaraskold on the same terms as those under contract from Mr. Werner, and that the Board will at some future time consider the extra expenses incurred thereon by the same.

"Much evidence was offered to establish the several items of the plaintiff's claim set out in his bill of particulars, commencing in December, 1851; but it is not believed necessary to report it. If any shall be omitted which appellant's counsel

Columbia, May, 1858.

may suppose important, they will append it to this report. In this connexion, it may be proper to refer to this case in 9 Rich. 474.

"A motion was made for a non-suit, on the following grounds:

"1. Because the defendants are sued in their official character, and not responsible for their contracts personally.

"2. Because there is no evidence showing any joint contract or liability of the persons sued as defendants.

"3. Because there is no evidence which establishes a contract by the defendants except as officers of the State.

"1. The motion was granted chiefly on the two first grounds. The defendants were attached to answer as 'Chairman and Commissioners for the New State Capitol,' and the declaration, reciting the writ, pursues this designation. 'The said defendants,' used in the several counts, referred to persons before designated in their official characters, and it did not appear to me to be a sufficient allegation to charge them personally. If the intention had been to charge them in the official character with which they were clothed, the declaration is correctly framed for that purpose; and although words of designation may sometimes be omitted, they cannot be regarded as *designationes personarum* only and surplussage, in the connexion in which they stand with these defendants, who received their appointment from the General Assembly, and contracted as public agents with the plaintiff.

"2. Conceding the sufficiency of the allegations to charge the defendants personally, it was insisted, that the evidence does not shew their joint liability in contracts made with the plaintiff. If his contract, as architect, was made October 1, 1851, when he received \$400, or at any time before December, 1852, there is no proof either from the legislative records, or from the minutes of the Commissioners, that John L. Manning, J. Harleston Read, Junior, or Charles F. McKay, were parties to such a contract. Until March, 1853, when

Hammarshold vs. Bull

John L. Manning first attended a meeting of the commissioners, he does not appear to have been connected with them.

"3. In support of the third ground, it was urged, that any contract made by the defendants with the plaintiff, was made in the character of public agents, within the scope of the authority conferred upon them, and that the plaintiff treated with them in their official character: That the appropriations made by the general assembly were for the work to be done, and not specifically for any one employee; that their authority was pursued and that there was no proof that they contracted with the plaintiff except in their public character."

The plaintiff appealed and now moved this Court to set aside the nonsuit, on the ground:

Because his Honor held, that under the pleadings, the Court could not consider any evidence going to show that the defendants had exceeded their authority as public agents, or had promised and assumed in their personal capacity, or were in possession of a fund, or to show that the defendants were in any other way personally liable, or liable at all, save only as public agents, (and therefore, not answerable.) Whereas it is respectfully submitted that the declaration was sufficient to sustain the action against the defendants, viewed otherwise than only as such public agents; and that, therefore, the evidence offered by the plaintiff going to show such exceeding of authority, such personal promise and undertaking, such fund, such personal liability, and such liability, other than only as public agents, ought to have been submitted to the jury.

Arthur, Bellinger, for appellant, cited 1 Chit. Pl. 246-7; Step. on Pl. 302; *Bristow v. Wright*. Doug. 640; 1 Chit. Pl. 372; Step. on Pl. 378; *McCool v. McCluney*, Harp. 486; *Browning v. Huff*, 2 Bail. 175; *Tobin v. Addison*, 2 Strob. 4;

Columbia, May, 1858.

Beasley v. Dun, 8 Rich. 345; *Robinson v. Cornwall*, 2 Bail. 137; *Black v. Shooler*, 2 McC. 275; *Kennedy v. Richey*, 1 Strob. 4; *Burrell v. Jones*, 3 B. & Ald. 47; *Ang. & A. on Corp.* 19; 1 Bouv. 77; 2 Kent, 278; *Pittstown v. Plattsburg*, 18 Johns. R. 407; *Chit. on Con.* 280; *Eaton v. Bell*, 7 Eng. C. L. R. 13; *Commissioners v. Murray*, 1 Rich. 341; 13 Mass. 193; 4 Rich. 46; *Davis v. Hunt*, 2 Bail. 412; *Vidal v. Clark*, 2 Rich. 359; *Brown v. Faust*, 2 Bay, 126; 5 Rich. 298; 9 Johns. R. 334; 7 Eng. C. L. R. 13.

Treadwell, DeSaussure, contra, cited Harp. 395; 2 Bail. 173; 1 Chit. Pl. 357; 2 McC. 295; 2 Atty. Gen. Op. 1414, 1447; 1 Atty. Gen. Op. 189, 458, 507; 14 Pet. 497; 1 Ball. & B. 189; 7 Mass. 259; 2 Kelly, 214; 3 Mass. 214; 1 T. R. 142; 7 Dowl. 275; 7 Scott, 97; 5 Bing. N. C. 253; 4 Bing. 566; 1 M. & P. 290; 1 Bro. C. C. 101; 5 Barn. & Ald. 34; 2 B. & P. 155; 2 East, 343; 2 H. Bl. 530; Doug. 59; Cowp. 682; 5 T. R. 623; 1 Phil. Ev. 133, 159; Doug. 667; 4 East. 400; Doug. 640; *Ang. & A. on Corp.* § 580; 3 Hals. 182; 10 Co. 120; 1 B. & P. 140; 1 Went. Pl. 181; 4 Scott, 182; *Miller v. Ford*, 4 Rich. 132; 1 Cra. 364; *Story on Ag.* § 302; *Story on Ag.* § 306; 10 Smeeds & M. 398; 18 Johns. R. 122; 5 S. & R. 498; *Fox v. Drake*, 8 Cow. 191.

The opinion of the Court was delivered by

O'NEALL, J. In this case I do not intend to follow the counsel through the immense array of authorities with which they presented their views to the Court. Our labors on the circuit and in this Court are sufficiently onerous, without undertaking to write essays on pleading, and speculative points. I concur fully with the Judge below in his ruling on the two first grounds, and I think the third ground is also fatal to the plaintiff's claim.

Hammarshold vs. Bull.

1. It is supposed that the former opinion, 9 Rich. 474, settled that the pleadings did not charge the defendants in their public character. But I am sure that is a mistake: the only point *then* before the Court was, whether my decision quashing the proceeding was proper. The Court thought it was not, and that the case must await its future chances, on a demurrer, or on a motion for nonsuit, after the facts had been fully brought out. That has been now reached, and we are now to decide, first, are the defendants charged in their public character? It seems to me if words have any meaning, such is the charge. They are sued as "the Chairman and Commissioners of the New State Capitol," and so treated throughout. The bill of particulars which points out the proof intended to be adduced, tells the defendants, the plaintiff charges you with various particulars in your public character, as agents for the State. But all this is nothing says the plaintiff; what I have said about your public character is surplusage—I will strike it out. The rule is, if the allegation need not be proved to entitle the plaintiff to recover, it may be struck out as surplusage. Let us test this case in that way: strike out everything touching the public character of the defendants and the case then stands as a claim by plaintiff rendered Messrs. Bull, Manning, Bedon and others as private gentlemen. The first piece of evidence may be the plan for the new State House. Can that be a charge against them? it is work done for the State, procured to be done by the plaintiff at the instance of the defendants, and with a full knowledge, on the part of the plaintiff, that they were acting for the State. It would be absurd to say *that* could be a charge against them individually. When the public character of the defendants is taken from the case, the plaintiff cannot move at all, for he has no evidence to sustain such a case,

Again it is supposed, that they can charge the defendants under an express contract made by them, and which must make them individually liable. To say nothing about the

Columbia, May, 1858.

necessity of declaring on that express contract, and the waiver of their public character, let us look to the proof adduced, the resolution of the 21st October, 1853. It is strange how ingenious minds may be misled. That resolution is a clear declaration that the plaintiff had his appointment from, and under the board, that is, the Commissioners of the New State Capitol; he is told that he bears the same relation to them, that he would to a private individual. That means, that he is to them responsible as he would have been if he had been employed by them as private individuals. What a monstrous perversion of the sense of words, to talk about that as a personal private contract on the part of the Commissioners!

It is next supposed that these defendants may be charged on this declaration, on account of acting outside of their authority. It is surely enough to say there is no proof of any such thing. Their beginning and progress about the work was reported annually to the General Assembly, and they approved of the same. Ratification confirms all which has gone before, and it is the same as if authorized before being done. But I do not think this proceeding could ever have charged them for any such thing. It would have been good pleading to have set out in an action on the case their public character, and then that they had exceeded their authority in inducing the plaintiff to do the work alleged and thereby he was injured.

If the defendants be regarded as a quasi corporation (which I do not think they are, they are merely agents acting for the State, like a committee from session to session of the General Assembly,) then that admits their public character, and there can be no recovery unless there be something beyond their contract. Now it may be when a quasi corporation has a fund to pay to the plaintiff, and will not pay it over, that by setting out that fact in the declaration there may be a re-

Hammarhold vs. Bull.

covery, but *here* there is no such matter set out. In any point of view on the first ground there can be no recovery.

2. On the second ground there is no proof whatever of a joint contract outside of the public character of the defendants. There is nothing like an assent by all to be bound except in the votes of a public body. So, too, many of the defendants came in at different times; and Messrs. Manning, Read, and McKay had nothing to do with his employment in October, 1851. Indeed Mr. McCay had no other agency in relation to the plaintiff than to move to dismiss him. Surely the absence of all proof of a joint contract is enough to end the pretence of personal liability.

3. The whole proof shows that the defendants contracted as agents of the State, and it is perfectly clear that they can not be made personally liable on such a contract. Indeed the law protects them entirely from suit. For the purposes of this case they are in place of the State. If this unfortunate plaintiff has any just claim let him apply to the General Assembly and he will have justice done to him. For never, in forty years, have I known a just claim utterly repudiated by the State. The General Assembly may render tardy justice, but as soon as they are convinced of the right, they have uniformly made amends.

The motion to set aside the nonsuit is dismissed.

WHITNER, GLOVER and MUNRO, JJ., concurred.

WARDLAW, J., concurring, said:—I think the defendants are sued as individuals, and that any judgment rendered against them on these pleadings must necessarily have been against them personally. If the intention had been to charge them *officially*, the action should have been against "The

Columbia, May, 1858.

Chairman and Commissioners of the New State Capitol," the body which acted by the will of a majority—a *quasi* corporation aggregate.

The pleadings, I think, are unobjectionable. The plaintiff alleges that the defendants promised,—they plead the general issue—under that plea it appears, by evidence, that the promises which were made, were made by the defendants as public agents, in other words, by the quasi corporation; the plaintiff may well rebut this, by evidence of anything which shows that the promises were binding on the defendants personally. It was no more necessary for the plaintiff to allege in his declaration the rebutting evidence, than for him to allege the evidence by which the making of the promise was to be shown.

I can see no evidence to show the concurrence of Mr. McCay in any joint promise to the plaintiff, made by the individuals, even if all the others became personally liable: and the joinder of too many defendants in an action upon contract is ground for nonsuit. Whatever Mr. McCay did was done in 1854, and was done by him as member of a board, not as an individual, and in exercise of the rightful power of the board to dismiss the plaintiff, not in confirmation of any unofficial agreement, which other members may have previously made with the plaintiff. A resolution, which in form seemed to have been adopted by the board, if it was such as to fix personal liability upon members, would avail only against the individuals who assented to it, and not against all the members of the aggregate body.

I have sought in vain for any evidence which would charge any of these defendants personally. The employment by some of them, in 1851, of an architect to prepare such a plan of a fire-proof building as would render the building fit to become part of a State House, was within the scope of their original appointment, and was approved by the Legislature. The resolution of October, 1853, instead of

Hammarshold vs. Bull.

acknowledging or establishing a personal liability, shows that the contract of plaintiff was with the board, and not with private individuals, and merely asserts the authority of the board and its chairman over him. The retention of his papers, even if admitted to be tortious, gives no action of *assumpsit*, against these individuals, for the advantage of it, if any, went not to individuals, but to the State for which they were acting. The appropriations which placed money at the disposal of the board, were not appropriations for the plaintiff, but for the work; and in the disbursement of them, a discretion was entrusted to public agents, which a Court cannot control.

I concur in dismissing the motion, but not in all the reasons which have been given for doing so.

Motion dismissed.

Columbia, November and December, 1857.

Columbia—November and December Term, 1857.

JOHN T. HADDEN *vs.* M. LEIBESCHULTZ.

Slave, Unlawful Beating of.

For beating a slave in the possession of a bailee, the owner is not entitled to recover the penalty of fifty dollars imposed by the Act of 1839, 11 Stat. 58.

BEFORE WARDLAW, J., AT EDGEFIELD, FALL TERM, 1857.

The report of his Honor, the presiding Judge, is as follows:

“This was an action of debt, within the summary jurisdiction of the Court, brought to recover the penalty of fifty dollars, which is prescribed by the 5 Sect. of the Patrol Act of 1839, 11 Stat. 58. The process alleged that the defendant ‘did beat a slave, the property of the plaintiff, quietly and peaceably being in the possession of Nicholas McEvoy, the bailee of the plaintiff,’ whereby the debt, &c.

“It appeared that the plaintiff, residing in Abbeville District, had entrusted the slave, his property, to the care and keeping of N. McEvoy, a boot-maker at Edgefield, as an apprentice—that disgusted with the noise which the slave made at night in his attempts to play the fiddle, the defendant, after previous warning to the slave, but without application to McEvoy, on two successive nights, entered the shop where the slave was playing, and flogged him in the presence of McEvoy, and against his remonstrance—not desisting the last time until, after choking McEvoy, he had been hustled out of the shop

Hadden vs. Leibschultz.

by other slave-apprentices, whom McEvoy called to his assistance.

"I doubted the plaintiff's right to recover under the allegations he had made, but to put the case in such situation that the attendance of witnesses would not in any event, be hereafter required, I decreed for the plaintiff fifty dollars, in each of the two cases."

The defendant appealed, and now moved this Court in arrest of judgment.

Bacon, for appellant. The Act is penal, and penal laws must be construed strictly. *State vs. Solomons*, 3 Hill, 79. The material words of the Act, and those constituting the statutory definition of the offence must be alleged, 3 N. & McC. 365; 3 Hill, 61; *State vs. Perry*, 2 Bail. 17; 1 McM. 274; 1 Sp. 49; 1 Bail. 144; 3 Chit. Pl. 357.

Spann, contra.

The opinion of the Court was delivered by

MUNRO, J. The point made by the defendant's third ground in arrest of judgment is, that the allegations in the process, assuming them to be true, do not entitle the plaintiff to recover the forfeiture prescribed by the fifth section of the Act of 1839.

The allegations in the process are, "that defendant at, &c., on the day of June, 1857, did beat and bruise, a slave named Henry, the property of the plaintiff, then and there quietly and peaceably being in the possession of N. McEvoy, the bailee of your petitioner," &c.

The portion of the fifth section of the Act of 1839, upon which the action is founded, is in these words—"If any white man shall beat or abuse any slave, quietly and peaceably

Columbia, November and December, 1857.

being in his master's plantation, or found anywhere without the same with a lawful ticket, he shall forfeit the sum of fifty dollars, to be recovered by the owner, and to his use, by action of debt, besides being liable to the owner in an action of trespass for damages."

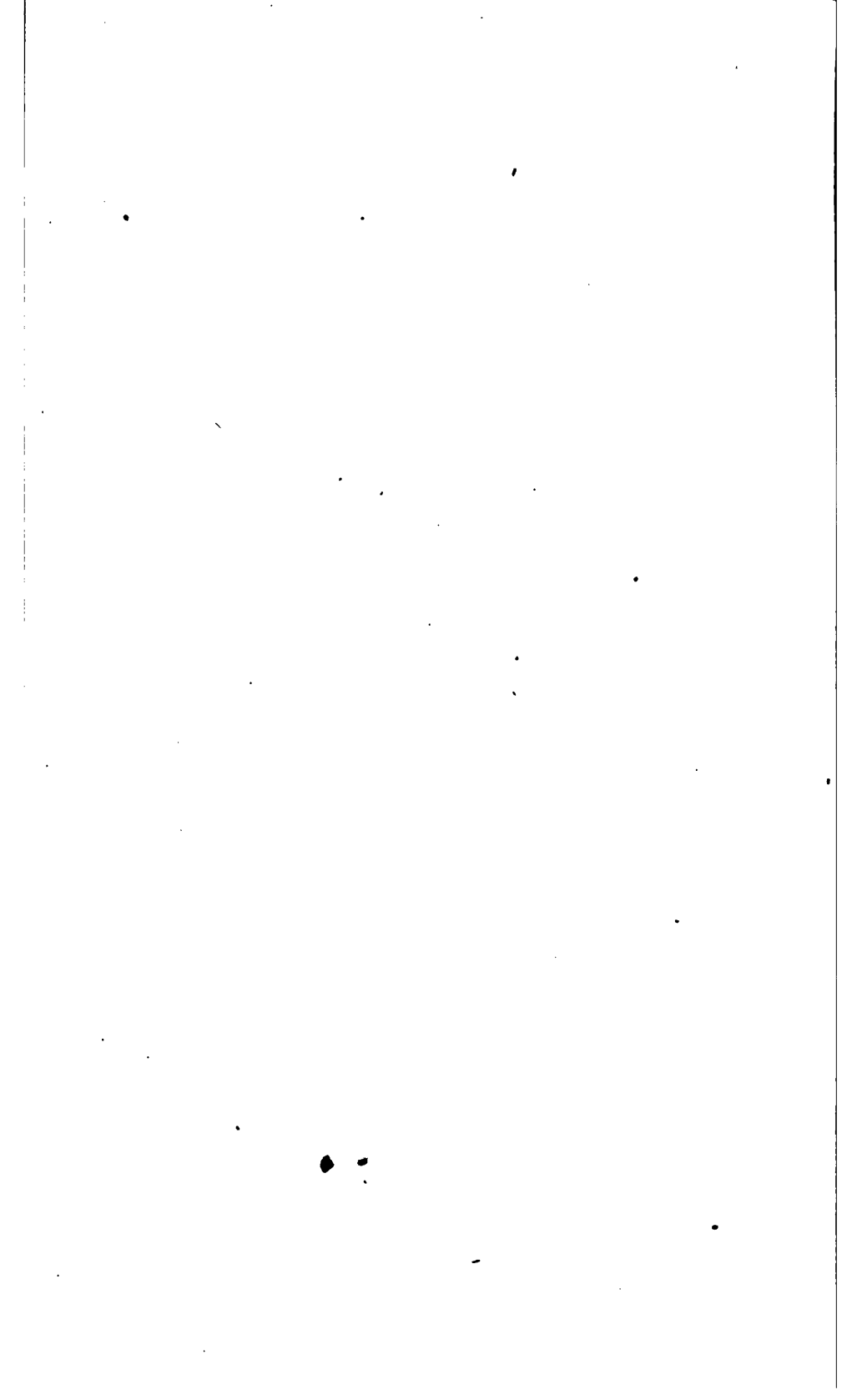
The proof was, that at the time the alleged trespass was committed, the plaintiff resided in Abbeville District, and had intrusted his slave to the care and keeping of N. McEvoy, a boot-maker, at Edgefield, as an apprentice.

For the outrage committed by the defendant, in entering the premises of the bailee, it is clear, that an action of trespass, either by the bailee, or by the owner of the slave upon his constructive possession, was the only remedy. For it is manifest that the cumulative remedy in question, is, by the express terms of the Act, restricted to cases only, where the beating or abuse of the slave is inflicted, either while he is peaceably and quietly within his master's plantation; or is without the same, but with a lawful ticket.

The defendant's motion in arrest of judgment, is therefore granted.

O'NEALL, WARDLAW, WITHERS, WHITNER and GLOVER, JJ., concurred.

Motion granted.



CASES AT LAW,
ARGUED AND DETERMINED IN THE
COURT OF ERRORS OF SOUTH CAROLINA.

Columbia—May Term, 1858.

NATHAN M'ALLISTER vs. TILMAN TATE.

Wills and Testaments—Evidence—Limitation of Estate.

One who drew a will, will not be received as a witness, to explain the meaning of certain ambiguous words.

A devise of land to one "in fee simple for life" carries the absolute estate.

BEFORE MUNRO, J., AT ANDERSON, FALL TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"The action was trespass to try titles. The plaintiff seeks to recover three-sixths of the land in dispute—one-sixth himself in his own right, as an heir-at-law of one Nathan McAllister, deceased; the other two-sixths as purchaser of the interests of Thomas McAllister and Elizabeth Emerson, a brother and sister of the said Nathan McAllister, deceased.

"The defendant, who was admitted to be in possession of the land, claims it under a conveyance from one Nathan McAllister Arnold, (date, the 11th August, 1846,) to whom

M'Allister vs. Tate.

it was devised by the last will and testament of the said Nathan McAllister, Sen., bearing date the 1st of June, 1836.(a.)

(a) The following is a copy of the will :

In the name of God, Amen. I, Nathan McCallister, of the State of South Carolina and District of Anderson, being in feeble health, and at advanced age, though of sound and disposing mind, memory and understanding, calling to mind the uncertainty of the continuance of life and the absolute certainty of death, and being desirous to dispose of the worldly effects that it has pleased God to bless me with, do make, constitute and ordain this to be my last will and testament hereby revoking all other wills by me heretofore made :

First, I give with confiding hope, my soul to God, and my body after my death, to be buried in a Christian manner.

Second, I give and bequeath to Nathan McCallister Arnold, a child raised by me, a certain tract of land, whereon David Gordon now lives, containing two hundred and ninety-three acres, more or less, *in fee simple for life*.

Third, I give and bequeath to *Nathan McCallister, son of Andrew McCallister*, the whole of that tract of land whereon I now live, containing about seven hundred acres, *in fee simple for ever*, on condition he pay to Francis McCallister, my brother, five dollars, and to his son, Nathan McCallister, ninety-five dollars, in one year and a day after his taking possession of said land, and the said Nathan McCallister, son of Andrew McCallister, is immediately after my death, to take possession of the aforesaid premises, together with all my personal estate; he is, viz., Nathan McCallister, to pay one hundred dollars to be equally divided among the heirs of Andrew McCallister that may be living at the time of my decease; also, one hundred dollars to Elizabeth Emberson, my only living sister; also, one hundred dollars to my brother John McCallister; one hundred to Thomas McCallister and William McCallister, my brothers; one hundred to each. Also, that he pay one hundred dollars to the heirs of Rosa McCallister, to be equally divided among them; one hundred dollars to be paid to Allen Arnold. All these legacies to be paid by the aforementioned Nathan McCallister.

I do constitute and appoint the said Nathan McCallister and John McCallister executors of this my last will and testament; and they are charged and enjoined to pay all my just debts, and faithfully execute this my last will and testament, according to the true intent and meaning of the same.

In witness whereof, I have herunto set my hand and seal, this the tenth day of June, in the year of our Lord one thousand eight hundred and thirty-six, and in the sixtieth year of American Independence.

NATHAN McALLISTER.

[SEAL.]

Signed, sealed, ratified and delivered
in the presence of each other, and at
the request of the testator,
In the presence of

ROBERT TODD,
ANDREW TODD,
A. EVINS.

Columbia, May, 1858.

The devise is in the following words: 'I give and bequeath to Nathan McAllister Arnold, a child raised by me, a certain tract of land, whereon David Gordon now lives, containing two hundred and ninety-three acres, more or less, in fee simple for life.'

"The defendant offered to show by Dr. Evins, who drew the will, what the testator meant by the words, 'fee simple for life.' I excluded the testimony, and instructed the jury, that, under the devise in question, the devisee, Nathan McAllister Arnold, took but an estate for life. The jury found for the plaintiff."

The defendant appealed, and moved the Court of Appeals for a new trial, on the grounds:

First. Because, it is respectfully submitted, his Honor erred in excluding the testimony of Dr. Alexander Evins, who drew the will of Nathan McAllister, deceased, and should have been admitted to interpret the words which he had inserted, and state the intention of testator.

Second. Because his Honor erred in instructing the jury that by a proper construction of the will of McAllister, Arnold, under whom the defendant held, took only a life estate.

Third. Because the verdict for the plaintiff is contrary to the law and the evidence.

The Law Court of Appeals, after hearing argument, ordered the case to this Court, where it was now heard.

Perry, McGowan, for appellant, cited *Cotton vs. Stenlake*, 12 East, 515—"Under a devise to one, and her heirs *during their lives*, held that the latter words were repugnant to the

M'Allister vs. Tate.

others, and that she took an estate of inheritance." *Smith vs. Pybas*, 9 Ves., 566—An estate to be equally divided between A., B. and C. and their heirs, or the survivor of them, in the order they are now mentioned. The concluding words, "in the order," &c., being rejected as repugnant. 1 Jarm. on Wills, 411, note—"It is now fully established that the general intent of the will, although first expressed, shall overrule the particular." See all the authorities referred to; 2 Williams, 789. *Bartlett vs. King*, 12 Mass. 557—"If there are words which have no intelligible meaning, or be absurd or repugnant to the clear intent of the rest of the will, they may be rejected." 1 Jarm. on Wills, 419—"It is clear, however, that words and passages in a will which are irreconcilable with the general context, may be rejected, whatever may be the local position which they happen to occupy; for the rule which gives effect to the posterior of several inconsistent clauses, must not be so applied as in any degree to clash or interfere with the doctrine which teaches us to look for the intention of a testator in the general tenor of the instrument, and to sacrifice to the scheme of disposing so disclosed, any incongruous words and phrases which have found a place therein." 2 Dess., 31 and 32—"The governing rule of construction in the case of wills is the intent of the testator; and that intent must be collected from the whole will; *ex visceribus testamenti*, so as to leave the mind quite satisfied about what the testator meant; and to construe, conformably thereto, so far as it is possible, consistent with the rules of law. When sentences are doubtful or ambiguous, the exposition must be made according to the testator's intent, which Lord Coke calls the pole star to guide judges in their determinations. In some cases equity will construe a will against express words to make it take effect according to the testator's intent, *and will reject inconsistent or contradictory words.*" *Wolf vs. Allcock*, 1 B. & Ald., 137, (see 1 Jarman, 438)—"A devise to a sister and her two daughters, their heirs and assigns, equally to be divided

Columbia, May, 1858.

between and amongst them, share and share alike, as tenants in common, and not as joint tenants, for and during the life of my said sister, Elizabeth Harley." Lord Ellenborough said, "The testator has thrown together a heap of words, the sense and meaning of which he did not clearly apprehend," &c. The latter words for life rejected, and the estate declared to be a fee simple. *Baker vs. Bridge*, 12 Pick. 27—"If by the terms of a devise, expounded with reference to all the other provisions of the will, it appears affirmatively that it was the testator's intent to give a fee, a fee will pass;" *Godfrey vs. Humphrey*, 18 Pick. 337. *Selwood vs. Mildway*, 3 Ves., 306—The testator gave property, and had no such property. It was admitted for the writer of the will to explain what testator intended. *Thomas vs. Thomas*, 6 T. R. 671—Parol evidence admitted to prove that the name of A. was inserted by mistake for B. *Evans vs. Godbold*, 2 Rich. Eq. 26—Where a testator uses a technical term, he is presumed to use it in a technical sense, unless a special intent to the contrary is manifested by the context. *Schoppert vs. Gillam*, 6 Rich. Eq. 83—The circumstances by which a testator is surrounded when he attests his will, will always be allowed an influence in the interpretation of dubious words or phrases in it. *O'Neill vs. Boozer*, 4 Rich. Eq. 22—Words of a will may be transposed in order to give full operation and consistency to the context. *Moon vs. Moon*, 2 Strob. Eq. 327—A devise explained by reference to the whole will. Testator stated his intention to dispose of all his estate, but did not, unless the wife took a fee in the land. 1 Jarm. on Wills, 427—As to the construction of words and phrases in a will. *Kersh vs. Younge*, 7 Rich. Eq. 100—"The deed to be construed most strongly against the grantor, and therefore, interests taken, under or by virtue of such instruments, are to be the largest of which the words are susceptible." "The court will not hold there is a reverter in any case, where any

M'Allister vs. Tate.

other reasonable construction can be given"—*Baldwin's Case*, 2 Co. R. 23; 6 Rich. Eq. 136.

Sullivan, Reed, contra, cited 5 Bac. Abr. Wills, 28; 1 Cowp. 99; Prec. in Ch. 473; 18 Ves. 421; 4 Kent 3; 8 T. R. 67; 20 Wend. 576; 5 Pick. 128; 3 Strob. Eq. 211.

The opinion of the Court was delivered by

O'NEALL, J. On the first ground of appeal the Court of Law entertained no doubt. The will is to be construed by the words used. The writer, Dr. Evins, was an incompetent witness to say what was meant by the words, "in fee simple for life." To solve that question, the case was ordered to the Court of Errors.

There is no doubt about the general rule, that in construing a will, the intention, when it can be ascertained, unless it be contrary to some rule of law, is to prevail. So, too, it is permissible, in construing a will, to read all its parts, and to gather light from any part, which may reflect it upon that which is dark and uncertain. The will *here* shows, that the testator intended to dispose of his whole estate: there is no residuary clause in the will! Each devise, therefore, it may be well argued, was intended to carry all the estate, which the testator possessed in the land devised.

That neither the testator nor his scribe knew the precise meaning of the term, in "fee simple," is, I think, true. For when he gave to Nathan McAllister another tract of land he used the words "in fee simple forever." When, if either had understood the meaning of the words "fee simple," he would have known that those words carried an estate to "a man and his heirs forever:" and that the word "forever" after the words "fee simple" was tautology.

To construe the words in "fee simple for life," as conveying an estate in fee, is, I think, the construction best in

Columbia, May, 1858.

support of the testator's intention. For it subserves and carries out his expressed purpose of disposing of his whole estate. But if they must be read by themselves, then they are utterly inconsistent, and both must be rejected; or the words "for life" must be regarded as absurd, and be altogether struck out of the will. Either course will sustain the defendant's title. If both are struck out, as unmeaning, when used together,—then the will would be read, as simply devising to Nathan McAllister Arnold. Such a devise by our Act of 1824, "for the amendment of the law in divers particulars therein mentioned," (1 §, Act of 1824, 6 Stat. 237,) would carry an estate in fee simple. The words of the first section are, "That no words of limitation shall hereafter be necessary to convey an estate in fee simple by devise; but every gift of land by devise shall be considered as a gift *in fee simple*, unless such a construction be inconsistent with the will of the testator express or implied." Who can say that there is any thing in the will inconsistent with the construction that the devise is in fee simple.

But if the words in "fee simple for life" must remain, then I think the rule that the words "for life" should be regarded as repugnant to the estate already conferred, and should be rejected, must prevail. For it is impossible to give a consistent meaning to the words in "fee simple," and the words "for life." The words, in fee simple, carry the estate to the devisee and his heirs forever. The words "for life" added to these would present the strange anomaly of an estate to a man and his heirs forever for life. This would be too absurd to be tolerated, and yet that is precisely the legal effect of using all the words contained in the devise.

The case of *Cotton vs. Stenloke*, 12 East, 514, it seems to me, favors the view which I have just taken. The devise there was, "I give unto my daughter, Phillis Cotton, and *her heirs*, Moorhead Meadow, *during their lives*." Lord Ellenborough, C. J., said, "The words *during their lives*, after the devise to

M'Allister vs. Tate.

the daughter and *her heirs*, are merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit, should enjoy the property; for whatever estate of inheritance the heirs of his daughter might take, they could, in fact, only enjoy the benefit of it for their lives." In this case, the devise is in legal effect to Nathan McAllister Arnold and his heirs, to which the testator added "for life." That, as in *Cotten* and *Stenlake*, might mean to describe the enjoyment of the devise by him and his heirs each in turn for life.

Without pursuing further the words so senselessly used, we are satisfied to declare that Nathan McAllister Arnold took an estate in fee.

The motion for a new trial is granted.

DUNKIN, DARGAN and WARDLAW, CC., and GLOVER, J., concurred.

WARDLAW and MUNRO, JJ., dissented.

JOHNSTON, Ch., and WITHERS, J., absent.

WHITNER, J., gave no opinion, having been consulted when at the Bar.

Motion granted.

CASES AT LAW,
ARGUED AND DETERMINED IN THE
COURT OF APPEALS OF SOUTH CAROLINA,

At Columbia—November and December, 1858.

JUDGES PRESENT.

HON. JOHN B. O'NEALL,
" DAVID L. WARDLAW,
" THOMAS J. WITHERS,

HON. JOSEPH N. WHITNER,
" THOMAS W. GLOVER,
" ROBERT MUNRO.

R. W. VANCE *vs.* JEFFERSON DAVENPORT AND OTHERS.

Executor—Single Bill—Failure of Consideration.

A. qualified as executor on a will of O., admitted to probate in common form, sold the goods and chattels of testator and took sealed notes for the purchase money. A later will, appointing B. executor, was afterwards discovered and admitted to probate, and A.'s letters testamentary were revoked and declared null and void. B., having qualified as executor, sued the purchasers from A. in trover, and against some he recovered, and others delivered up the property: *Held*, that the consideration of the single bill given to A., had failed, and that he could not recover thereon.

BEFORE WHITNER, J., AT NEWBERRY, FALL TERM, 1857.

These were separate actions on single bills, given to the plaintiff. Some of the actions were by *sum. pro.* and others were appeals from a magistrate's decrees in favor of defendants.

On November 15th, 1855, a will of David Pitts, late of

Vance vs. Davenport.

Newberry, was admitted to probate in common form, and letters testamentary were granted to the plaintiff, executor and legatee. This will was dated 16th January, 1855. On the 7th December, of the same year, the plaintiff sold some of the personal estate of testator, and took from the purchasers single bills bearing interest from date, and payable one year after date. These single bills were the causes of action in the cases sued.

Some time after the sale a will of the same testator, bearing date the 5th March, 1855, was discovered and offered for probate. After some contest this last will was admitted to probate, and George W. Pitts qualified as executor thereof. The letters testamentary granted to the plaintiff were revoked and declared null and void.

Pitts brought actions of trover against the several purchasers from plaintiff. Two compromised by delivering up the property they had purchased, and against the others recoveries were had, which were satisfied. The plaintiff was not notified to appear and defend the actions of trover.

His Honor dismissed the appeals from the magistrate, and decreed for the defendants in the other cases.

The plaintiff appealed.

Sullivan, for appellant, cited *Wms. on Ex'ors.* 368; *Benson vs. Bynum*, 2 N. & McC. 577; *Price vs. Nesbitt*, 1 Hill, Ch., 461; *Foster vs. Brown*, 1 Bail. 221; *Boyd vs. Sloan*, 2 Bail. 311; *Poag vs. Miller*, Dud. 2, 13.

Williams, Jones, contra, cited *Tol. Law of Ex'ors.* 79; *Wms. on Ex'ors.* 395.

The opinion of the Court was delivered by

O'NEALL, J. The plaintiff is the executor of a will of David Pitts, deceased, which was admitted to probate in com-

Columbia, November and December, 1858.

mon form: he qualified, and sold his testator's estate, parts of which the defendants purchased, and gave for their respective purchases the single bills on which these cases rested. Subsequently a later will was found, admitted to probate, and the plaintiff's letters testamentary revoked, and letters testamentary granted to George W. Pitts, the executor named in it, who brought trover for the property purchased by the defendants and recovered in all, except in two cases, in which the defendants delivered up the property. So the question in all the cases is, whether Vance is entitled to recover notwithstanding the setting up of the last will and the revocation of his letters?

I am clear that his title to the property sold, failed on the probate of the last will, and that of course there was a failure of consideration of the single bills sued on.

The property of the deceased's goods, is in his executor, and when it was shown that the plaintiff was not his executor by the probate of the last will, in which George W. Pitts was appointed executor, and who had qualified, he (Vance) had of course no title, and those who purchased from him could have none.

Pitts (George W.) was the executor and was rightfully and legally the owner of the property of the testator, and the defendants could not resist his claim. The probate of the first will and the qualification of Vance as executor, and his sale under it, cannot avail anything. For the last will revoked and annulled the first, and carried with it all the testator's property to the executor, George W. Pitts.

The cases of *Poag, adm'or, vs. Miller and Black*, Dud. 13, are decisive of these cases, and supersede further argument or illustration.

The motions are dismissed.

WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motions dismissed.

Ex parte vs. Cantey.

Ex parte J. W. CANTEY.

Ex parte ZACH. CANTEY.

Insolvent Debtors' Act—Notice.

Application for the benefit of the Insolvent Debtors' Act need not be made at the next term after petition filed, even though ninety days may elapse between the filing of the petition and the sitting of the Court. The petitioner is in time if the notice be given to the second term, and the application be then made.

BEFORE WHITNER, J., AT KERSHAW, FALL TERM, 1858.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

De Pass, for appellant.

Kershaw, contra.

The opinion of the Court was delivered by

GLOVER, J. The petitioners were arrested on civil process, October 30, 1857, and gave bonds for the prison rules the same day. On the 7th and 8th December, 1857, they filed their petitions and schedules, but the notice summoning creditors was not published until the 27th July, 1858. At the November term of the Court for Kershaw District, 1858, a motion was made before Whitner, J., to discharge the petitioners, which was granted.

The creditors have appealed, and move to reverse the order made on Circuit, "because his Honor erred in holding that the neglect of the petitioners to give the three months' notice to creditors, as required by the statute, in time for the

Columbia, November and December, 1858.

succeeding term of the Court, after the filing of their petitions and schedules, did not preclude them from the benefit of the Act, though the petitioners had sufficient time for giving the said notice before the sitting of the succeeding term of the Court."

The 1st Section of the Act of 1759 (4 Stat. 86) provides, that if any person shall be arrested for any debt, etc., it may be lawful for him to exhibit his petition, etc., "and upon such petition the Court may, and is hereby required, by order or rule, to cause the petitioner to be brought before them, and as well the creditors at whose suit such person or persons shall stand charged, as all other the creditors to whom he, she, or they shall be indebted, to be summoned by public notice, to be given three months at least in one or other of the gazettes," etc.

The Act does not require that the notice shall be published immediately after the filing of the petition and schedule, or "in time for the next succeeding term," although three months may intervene, nor at any definite time afterwards. The intention is, that before the discharge of the prisoner, ample time shall be given to the creditors to resist his petition. The Legislature did not suppose that a prisoner either within the prison or the prison-rules, would voluntarily submit to confinement by neglecting, at the earliest period, to pursue the mode prescribed for his release. Such indifference to personal liberty would be a reproach to a freeman, and where delay ensues, we may readily conclude that a reasonable excuse can be given. These prisoners excuse their delay on the ground that they believed that the duty to summon creditors by a published notice devolved on the Clerk of the Court, and the language of the section referred to furnishes foundation for such belief. The Court is required to cause the petitioner to be brought before them, and the creditors to be summoned by public notice. This direction may not be so explicit as that which is given in the 4th

Ex parte *vs.* Cantey.

section of the Prison Bounds Act of 1788, (5 Stat. 78,) which expressly requires the Clerk to give the notice within ten days; but if a doubt may be entertained in respect to the person on whom the law imposes the duty of giving notice, under the Act of 1759, we would resolve it in favor of prisoners, and hold that their mistaken interpretation of the words is a sufficient excuse for the delay. The clerk could not have been ignorant when the petitions were filed that the prisoners sought the benefit of the Insolvent Debtors' Act, as no petition is required preparatory to a discharge under the Prison Bounds Act. Whether the delay ensued from the neglect of the clerk, or from the mistake of the prisoners, the order made on Circuit was proper, and the motion is dismissed.

A second ground of appeal is appended to the notice: "Because his Honor erred in holding that such neglect to give the required notice was not a forfeiture of the prison bounds bonds given by the petitioners, though there was made no showing, accounting for the delay."

It does not appear from the report that the Judge expressed such views, and the case does not demand the expression of opinion by this Court, in advance, respecting those acts which may be considered breaches of the conditions of prison bounds bonds.

Motion dismissed.

O'NEALL, WARDLAW, WITHERS, and WHITNER, JJ., concurred.

Motion dismissed.

Columbia, November and December, 1858.

JOHN McMILLAN, Assignee, vs. EDWARD L. WHITAKER.

Bail bond—Practice—Pleading.

An action of debt lies in any District Court of the State, on a bail bond taken in the City Court of Charleston.

BEFORE O'NEALL, J., AT GREENVILLE, FALL TERM, 1858.

This was an action of debt by the assignee on a bail bond taken in the City Court of Charleston, where the original action was commenced and prosecuted to judgment. *Ca. sa.* had been issued and the bail fixed.

The defendant demurred generally, and contended that the action was local, and confined to the Court and District where the judgment was recovered and the bond assigned.

His Honor overruled the demurrer, and the defendant appealed.

Thomas, for appellant. There are two remedies on a bail bond, one by *sci. fa.* and the other by action of debt. That the first is local there can be no doubt, Act 1795; 1 Brev. Dig. 53; and as this arises from the nature of the grievance it would seem that the peculiarity belongs also to the concurrent remedy, 1 N. & McC. 323. By the law as it existed before 1795, the sheriff might sue in any county, but it was not so with the assignee. He could sue only in the county where the bond was taken or assigned, 2 Tidd. Pr. 1100; 1 Tidd. Pr. 300; 1 Wheat. Sel. 53; 1 Esp. Dig. 26, 51; 2 Chit. Pl. 471; Hob. 106; 2 Bur. 1923; 3 Wils. 343; 2 T. R. 569; 3 Chit. Gen. Pr. 388.

Elford, contra.

McMillan vs. Whitaker.

The opinion of the Court was delivered by

O'NEALL, J. In Tidd's Practice, 1106, it is said that a *scire facias* on a bail piece must issue out of the Court from which the bail writ issued; and at 411, the same doctrine is stated in an action of debt. But the key to all this is, that in England there are two Courts of concurrent legal jurisdiction, the Kings' Bench and Common Pleas, and the remarks of the author apply to that state of things; an action on a bail piece in the King's Bench must be in that Court, and so in the Common Pleas. In this State we have but one legal forum for the assertion of civil rights, the Court of Common Pleas. The writs of that Court run through the whole State, so that a recovery in Charleston, in the Common Pleas, is enforceable in every District of the State. It is true the City Court is of inferior and local jurisdiction, yet it is a Court of Common Pleas, and its process is to be enforced and protected as such.

In *Legare*, assignee, vs. *Brown*, 4 McC. 371, the action was in the City Court, on a bail bond taken in the Court of Common Pleas for Charleston District. It was objected that the bond could only be sued in the Court where it was taken, and where the original action had been brought.

But the Recorder, (that eminent jurist, Drayton,) overruled the objection, holding, that it was enough, if the suit was brought in the Court of Common Pleas; and that the City Court was a Court of Common Pleas.

That authority is enough for this case. For if the City Court could maintain the suit on the bond, in that case, much more may the larger jurisdiction of the Common Pleas maintain the action on the bond taken in the inferior jurisdiction.

The motion is dismissed.

WARDLAW, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, November and December, 1858.

THE STATE *vs.* ALFRED HATCHER.*Presumption—Lapse of Time—Verdict and Sentence.*

After the lapse of more than twenty years the Court will not set aside the verdict of guilty upon an indictment for misdemeanor, and the sentence indorsed upon the record, upon the ground that the defendant had not been arrested, nor had entered into recognizance. In such case the law presumes *omnia esse rite acta*, especially if it appears that seven years after the trial and sentence, the defendant was served with *sci. fa. quare executio non*, made default, and that execution issued.

BEFORE WARDLAW, J., AT EDGEFIELD, FALL TERM, 1857.

It appeared by the record that at Fall Term, 1835, the defendant was indicted for keeping a riotous and disorderly house, and a true bill found; that at Spring Term 1837, a verdict of guilty was rendered, and the following sentence endorsed on the indictment. "Let the defendant be imprisoned two months and pay a fine of \$500. J. B. O'Neill, P. J." There was an affidavit and also a warrant to arrest, but no entry or indorsement which showed that the defendant had been arrested, or that he had entered into recognizance to appear.

The defendant made affidavit that he had never been arrested under the warrant; that he had never entered into recognizance to appear; that he was absent from the State from the Fall of 1836, until December, 1838; and that he had no knowledge that the proceedings were pending against him until long after the trial and conviction; and he moved that all the proceedings subsequent to the finding of the grand jury be set aside.

The report of his Honor, the presiding Judge, is as follows :

"I refused a motion to set aside the proceedings. Besides the presumption that the original proceedings were regular,

State vs. Hatcher.

it appeared that a *sci. fa. quare executio non* had, under the judgment, been personally served on the defendant, after the expiration of seven years from the sentence, and that no cause having been shown to the contrary, an order for execution passed by default."

The defendant appealed on the grounds :

1. Because the defendant was never arrested under the warrant issued in the said cause, or otherwise made a party to the said indictment.

2. Because the *scire facias* issued on the sentence was unauthorized, and null and void.

Bauskett, for appellant, made the following points:

1. That the Court of General Sessions cannot bring its authority in action on any one unless he is personally present, has been arrested, or has voluntarily made himself a party to some proceeding by entering into a recognizance to answer the charge—in other words he must be personally present in Court, or he must be made a party. In this case the proceedings, independent of his own affidavit, do not show that the defendant was a party, but the contrary.

2. The sentence was never pronounced by the Court on the defendant, but was indorsed by the Judge before whom the case was tried on the indictment, and left with the Clerk of the Court.

3. Presumption of the regularity of the proceedings arising from the lapse of time is a legal fiction, does not prevail in criminal cases against the accused, and is worth nothing, where the truth is known to be otherwise, in the Court of Sessions. It is admitted that a different rule prevails in regard to rights of property.

Columbia, November and December, 1858.

4. The written sentence left by the presiding Judge, if valid and now in force as to the fine, (an effort to collect which gave rise to the motion on circuit,) is equally good as to the imprisonment. And it is submitted and maintained, that if the defendant were now brought into Court to be sent to jail under that sentence, he would have a right to show for cause that the whole proceedings were *ex parte*, or rather the State would have to show that the defendant was a party; and lapse of time is inadmissible to prove the record of arrest or recognizance.

5. The *sci. fa. quare executio non* was simply a void proceeding, arising from inadvertence and mistake on the part of the State's officers. If there was a *judgment* of the Court the *sci. fa.* was proper; if not, it was irregular, void, and obnoxious to the disregard of the defendant. It was but a continuation of the old proceeding. *Wright vs. Nutt*, 1 T. R., 388; 2 Tidd, Pr., 983.

6. The serving a paper on one from the Court of Sessions not under *arrest* or recognizance to appear and answer, is a proceeding wholly unknown to the practice and procedure of that Court; and when done, may be disregarded without incurring liability, or the penalty of contempt. The proceeding should have been a bench warrant to *arrest* the defendant to answer to the charge in the indictment.

7. The not showing cause to the *sci. fa.*, like mere silence to an unauthorized question, simply left the matter where it stood before, neither implicating the defendant nor conferring authority on the Court. And if the defendant, by return, had shown the grounds of the present motion, they were not new matter unknown to the Court, but such as the Court, would, of its own mere motion, take judicial notice.

Owens, Solicitor, contra.

State vs. Hatcher.

The opinion of the Court was delivered by

O'NEALL, J. The sentence in this case appears to have been pronounced more than twenty years ago. The defendant had been tried and convicted of a misdemeanor at the same Court at which the sentence was pronounced. He alleges now, that he had never been arrested, nor had entered into a recognizance for his appearance.

After such a lapse of time, it is in vain to say that neither the warrant, the certificate of arrest, nor the recognizance can be found: *the law presumes omnia esse rite acta*.

But in addition to this, the defendant has been served with a *scire facias quare executio non*: made default, and thereupon execution issued for the collection of the fine. This would be enough to prevent his present motion from receiving any favor from the Court.

In *Sartell vs. Brailsford*, 2 Bay, 333-8; after twelve years from final judgment the Court refused to set aside the proceedings and judgment, although the party alleged she was a *feme covert* at the execution of the bond on which the action was founded. That case founded on an alleged void instrument is certainly parallel to this, *where*, it is pretended the party was never arrested.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed

Columbia, November and December, 1858.

THE STATE vs. BENJAMIN J. JEFCOAT.

Nuisance—Gates across Highways—Private Path—Ways.

A neighborhood road, or *private path*, as it is called, is within the provisions of the Act of 1855, (12 Stat. 408,) authorizing the erection of gates upon all such roads as are not public highways.

One cannot have a private right of way over and along a public road.

BEFORE WHITNER, J., AT LEXINGTON, FALL TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"The defendant was indicted for wilfully leaving open a gate, under the 2d Section of 'An Act to authorize the erection of gates upon all such roads as are not public highways,' passed in 1855. See Act of Assembly, 1855, p. 408.

"The road in question was common to the neighborhood, such as are denominated private paths, and led from one highway to another. Across this road William Knotts had erected two gates, and had enclosed about two hundred and fifty acres, of which eighty or ninety acres were in cultivation. The overseer of the prosecutor, Knotts, testified that these gates were on the lands of the prosecutor; and, on his cross-examination, described the lines. The road led by the house of Joshua A. Jefcoat, and the gate was near his residence. The defendant, a young man about twenty years of age, was his son, and lived in his family. The prosecutor had been so frequently annoyed by the gate being left open, that the overseer watched and thus detected the defendant.

"As matter of defence a record of proceedings in Equity was adduced—*Lewis Robinson and wife vs. Urban Jefcoat and others*—for partition of lands of old Mr. Benjamin Jefcoat. The tract H, as shown by a plat returned by the Commissioners, was assigned to Joshua A. Jefcoat and wife; and

State vs. Jefcoat.

tract B, on which the gate was erected, now belonged to prosecutor, as explained by Wiley J. Jefcoat.

"There was a mill near by, though not immediately on the road, which belonged to Joshua A. Jefcoat and Wiley J. Jefcoat, each one-fourth and remaining half owned by prosecutor. A right of way was secured by these proceedings in Equity to Joshua A. Jefcoat, from his house to this mill, and the way indicated was along the road in question, from the house about two hundred and thirty yards, and then turning to the right to the mill, the gate being about two hundred yards below the house, and thirty yards or thereabouts above the fork.

"The defendant was convicted on the instructions of the presiding Judge, on the legal points raised, and which are sufficiently indicated in the grounds of appeal annexed."

The defendant appealed and moved this Court for a new trial on the grounds:

1. Because the State failed to offer any competent evidence that Wm. Knotts, the prosecutor, was the legal owner of the land on which the gate was erected.

2. Because the Act of Assembly of 1855, authorizing the erection of gates on certain roads, is inapplicable to the defendant's right of way, from his dwelling to his mill, and does not authorize the erection of a gate across it.

3. Because the Act of 1855, so far as by its terms, it embraces and authorizes the erection of gates across the defendant's private right of way from his dwelling to his mill through the prosecutor's land, is unconstitutional.

Meetze, Bauskett, for appellant. The Act of 1855 does not give a right to erect gates across private ways; if it does, it is

Columbia, November and December, 1858.

unconstitutional. This was a private way by express grant under the proceeding for partition. They cited *Pearce vs. McClenaghan*, 5 Rich. 186; *Sims vs. Davis*, Chev. 1; *Hogg vs. Gill*, 1 McM. 329; *Nash vs. Peden*, 1 Sp. 17; *State vs. Sarter*, 2 Strob. 60; 1 McM. 178; 3 McC. 170.

Fair, Solicitor, contra.

The opinion of the Court was delivered by

MUNRO, J. That a neighborhood road, or private path as ways of this sort are strangely denominated in our early legislation, is within the provisions of the Act of 1855 cannot be doubted: for, in the case of the *State vs. Pettis*, (7 Rich. 390,) which was decided the previous year (1854), it was held, that the owner of the land burdened with a similar easement, might acquire a prescriptive right to erect a gate across the road, provided it could be opened and shut at pleasure—so that the object of the Legislature in passing the Act in question, was manifestly to confer upon the owner of the land a similar right, by direct grant. The defence relied on however, is, that in the partition of an estate in which the defendant's father had an interest, and prior to the erection of the gate in question, the Commissioners appointed to make partition thereof, had allotted to the latter, a private right of way over this very road; consequently the erection of the gate by the prosecutor Knotts, was in derogation of such right, and unauthorized by the Act of 1855.

How a private right of way, a right which one individual has to pass over the land of another, can exist in that which is common to the whole community, is a proposition not easily comprehended: for the above cited case of the *State vs. Pettis*, to say nothing of others, is sufficient to show, that the public at large, have as much right to the use of a private

State vs. Jefcoat.

path as they have to the use of any of the public highways under the control of the Commissioners of Roads.

That the road which leads from the defendant's father's mill, to where it intersects the road in question, is a private way, may readily be conceded: but it is only at the point of intersection with the road in question, that its character as a private way commences; and the attempt of the Commissioners to allot to him a private right of way, over the highway in question, could no more affect the character of the latter, than if they had attempted to allot to him a private right of way over any of the public highways of the country.

The motion is therefore dismissed.

O'NEALL WARDLAW, WITHERS, WHITNER and GLOVER, JJ., concurred.

Motion dismissed.

Columbia, November and December, 1858.

MILES SOUTHERN vs. JOHN W. CUNNINGHAM.

Contract—Conditional Sale—Trover—Vendor and Vendee.

Where the contract of sale gives the purchaser the option to return the slave and pay hire, if by a certain time he should not like her, the contract is conditional, and does not confer such complete title on the vendee as will enable him to maintain trover against the vendor for taking away the slave within the time.

BEFORE WARDLAW, J., AT GREENVILLE, EXTRA TERM,
AUGUST, 1858.

Every thing necessary to a full understanding of this case is contained in the opinion delivered in the Court of Appeals.

Elford, Perry, for appellant, cited Add. on Con. 23.

Sullivan, contra, cited 7 Rich. 67.

The opinion of the Court was delivered by

GLOVER, J. This was an action of trover to recover damages for the conversion of a negro woman called Patsy, tried before Wardlaw, J., at Greenville, at an extra term of the Court, in August, 1858. The defendant as the agent of W. F. Prince, the owner of Patsy, sold her it is alleged to the plaintiff, into whose possession she went two days afterwards. Whether the contract of sale was complete depended upon the evidence, which consisted of the declarations of the parties.

On several occasions the defendant said he had sold her to plaintiff for six hundred and twenty-five dollars payable

Southern vs. Cunningham.

at Christmas, and he once inquired, if plaintiff would "take twenty-five dollars for a rue bargain," and added, "if he would not, take it he might count on paying to the day or being sued." To Westmoreland the plaintiff said, "I have until Christmas to decide whether I will take Patsy," and to Prince he said "I bought her with the understanding that I was to keep her till Christmas, then if I liked her, I was to keep her; if not, I was to pay hire for her. He has taken her away." In a conversation with Prince, when plaintiff applied to buy or hire Patsy, Prince said to him, "if hired, she must be taken on condition that she shall be given up when called for, for I may sell her." Before Christmas, the defendant forcibly took Patsy out of the possession of plaintiff, who afterwards brought this action.

The Judge says, "I explained to the jury the nature of the contract of sale and instructed them, that the plaintiff could not sustain this action unless there was title in him when the defendant took away the woman: that mutuality forbade the conclusion of such title, if the plaintiff had time for decision and was not then subject to the responsibilities of a buyer; and that, under the supposition of something to be done at or before Christmas, the title remained in the defendant or in Prince, unless it should appear to the jury that the plaintiff had actually bought with the privilege on his part to rescind, at or before Christmas, upon payment of hire." The jury found a verdict for the plaintiff, and the defendant moves for a new trial on several grounds; but it is necessary to notice only the first: "Because the testimony plainly establishes the fact, that the contract of sale was only executory, and the plaintiff had no right of property."

If the plaintiff's account of the agreement be true, that he had bought with the understanding that he was to keep Patsy until Christmas, then if he liked her, he was to keep her, and if not, to pay hire, the contract

Columbia, November and December, 1858.

of sale was not complete but conditional, and the continuation of it must depend upon the condition. Such contracts are termed *sale or return*, (Ross on Vendors, 60,) and although the vendee has a qualified property, the completion of the sale depends on the performance of the condition precedent. If the plaintiff had kept the possession of Patsy until Christmas, and had not then returned her, the contract would have been binding by the resolution of the condition; or, if he had at Christmas approved her qualities on trial, the absolute property would have vested in him. In the case of *Ellis vs. Mortimer*, (1 Bos. & Pull. N. R. 257,) the contract of sale was in all respects like this; there the plaintiff agreed to sell to the defendant his horse for thirty guineas if he liked him, and that he should take him a month upon trial; and it was held, that defendant had to the end of the month to judge if he liked the horse at the price.

The defendant having taken Patsy out of the plaintiff's possession, within the time limited, the performance of the condition precedent became impossible, and consequently, no absolute property vested in the plaintiff, who may have a remedy for the breach of the contract, but could not support an action of trover, unless he had title at the time of the conversion. We approve, therefore, the instructions given to the jury, "that under the supposition of something to be done at or before Christmas, the title remained in the defendant or in Prince;" but we are of opinion that there was error in the qualification annexed to this part of the charge:—"Unless it should appear to the jury that the plaintiff had actually bought with the privilege on his part to rescind at or before Christmas, upon payment of hire."

A contract to purchase, with the privilege to rescind at or before a specified period, is a conditional contract of sale, and does not materially differ from a sale of goods on trial. If the jury believed that the plaintiff stated correctly the terms

Southern vs. Cunningham.

of the contract, they may have been misled by this qualification of the charge, and on this ground a new trial is ordered.
Motion granted.

O'NEALL, WARDLAW and MUNRO, JJ., concurred.

WITHERS and WHITNER, JJ., did not hear the case.

Motion granted.

Columbia, November and December, 1858.

JOSEPH EDWARDS AND OTHERS *vs.* JOSEPH EDWARDS, JR.*Evidence—Loss of Deed.*

To prove loss of a deed executed fifteen years before the trial, it was shown that it was delivered to the grantor at the door of the clerk's office to be recorded; that it had never been recorded, and was not in the clerk's office; that the grantor had afterwards conveyed the land to defendant, and had removed from the State: *Held*, that the evidence was sufficient to let in secondary evidence of the existence and contents.

The question of loss was submitted to the jury: *Held*, that their verdict for plaintiff, establishing the loss, must be considered as having removed all doubt.

BEFORE O'NEALL, J., AT GREENVILLE, FALL TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of trespass to try title.

"The plaintiffs are the children of Jesse Edwards, to whom the land in dispute was twice conveyed by his father: 1st, absolutely; that deed was produced by defendant, but never recorded; 2d, to him for life, with remainder to his children. Jesse Edwards was in possession more than ten years. Lewis Threlkeld proved that a copy deed, which he produced, was a true copy of a deed executed by Jesse Edwards, in his presence and Esquire Barbary's, who subscribed as witnesses. The execution was proved before a magistrate. There was no seal on the copy, and yet both witnesses proved that the deed was signed, *sealed*, and delivered, (or duly executed.) The original deed Threlkeld proved, after having been proved before a magistrate, was handed by him to Jesse Edwards, at the door of the clerk's office, to be recorded. It had never

Edwards vs. Edwards.

been put on record, nor could the deed be found on examination in the clerk's office. Jesse Edwards removed from the State. I admitted this copy. Its contents were a release of the life estate of Jesse Edwards to the remaindermen, his children. It was dated 19th December, 1843. There was evidence from which the minority of several of the plaintiffs might have been inferred. The objection that *that matter* had not been shown, was started by Mr. Elford in his argument to the jury. Mr. Perry alleged it was a mere oversight on his part. I allowed him to put back Kemp, who knew the plaintiffs in Georgia, where they lived. He proved the minority of several of the plaintiffs.

"The defendant relied upon a deed to himself for the land, dated 14th February, 1845, and possession from that time to the present.

"That deed was duly recorded, and was entitled to be preferred, unless the defendant had explicit notice of the deed under which the plaintiffs claimed.

"Upon that question, Threlkeld proved that he met the defendant at Greenville, who told him he had bought Jesse Edwards' land. The witness asked him if he had not got into trouble; that Jesse Edwards could not sell. He said he did not care; he had his father's bond to indemnify him. He would pay for the land, if Jesse Edwards' children sent him a title.

"Joseph Powell, Esq., proved that he prepared a deed, which was before him, from Jesse Edwards' children to Joseph Edwards, the defendant, for the land. He said his understanding was, if it was executed by them, the defendant would pay for the land. The deed was signed and sealed by all who were of full age, and offered to defendant if he would pay the price. He refused to pay.

"This deed was produced on the trial.

"A. J. Kemp proved that the defendant told him that he had written to the plaintiffs, if all who were of full age would

Columbia, November and December, 1858.

fix up the title, they could receive all their share of his father's estate.

"Esquire Barbary proved that the defendant told him he might have to give up the land when the youngest *child came of age*, but in the meantime he could cut off all the timber. He said that the defendant had cut off all the timber, and that the timber thus cut was worth two dollars per acre. The tract contained one hundred and sixteen acres.

"The case was carefully submitted to the jury: 1st, on the question of the loss of plaintiffs' deed. They were told unless the proof satisfied them of the loss, the plaintiffs could not recover.

"2d. They were told unless the deed was sealed, it could not avail. The copy was unsealed; but the proof might satisfy them that the original was sealed.

"3d. They were instructed, unless the defendant had explicit notice of the plaintiffs' deed, his recorded deed must prevail. They were referred to Threlkeld, Powell, Kemp, and Barbary, and they were told unless their proof satisfied them that the defendant knew just as much about that deed as if he had seen it on record, the plaintiffs could not recover.

"4th. They were told that the defendant's possession for thirteen years would prevent a recovery, unless some of the plaintiffs were minors.

"5th. If the jury thought the plaintiffs were entitled to recover on all these points, then they would be entitled to recover the land and such damages as the jury thought might fully compensate them for the timber cut off.

"The jury found for the plaintiffs the land, and, I think, \$175 damages."

The defendant appealed, and now renewed his motion for a nonsuit upon the grounds:

1. Because the paper purporting to be a copy deed from

Edwards vs. Edwards.

Jesse Edwards to the plaintiffs, which was produced in evidence of the title of the plaintiffs, and which was proved by W. D. Threlkeld to be an exact copy of the original, was without a seal, without which the original paper would not be a valid conveyance of land.

2. Because the plaintiffs' testimony established the fact that the defendant had been in peaceable and adverse possession of the land in dispute for thirteen years; and there was no testimony to show that any of the plaintiffs or any of the parties claiming the land were minors, until after the argument was closed, when, it is respectfully submitted, the Court erred in admitting such testimony.

3. Because the testimony of the plaintiffs' witnesses did not afford such proof of title in the plaintiffs as entitled them to have the case submitted to the jury.

And failing in that motion, then he moved for a new trial, upon the grounds:

1. That the proof of loss of the original deed was not sufficient to warrant the introduction of a copy in evidence.

2. Because the paper purporting to be a copy of the original had no seal, and such a paper could not convey land.

3. Because the deed from Jesse Edwards to the plaintiffs was never recorded, and was void as against the subsequent deed to the defendant, no sufficient proof of notice having been established against the defendant.

4. Because, it is respectfully submitted, that his Honor erred in permitting plaintiffs' attorney to examine a witness

Columbia, November and December, 1858.

to prove the minority of some of the plaintiffs after the argument was concluded.

5. Because by reason of the insufficiency of such proof of title in the plaintiffs, and for the other causes set forth above, the verdict for the plaintiffs was contrary to law and evidence.

Elford, for appellant.

Perry, contra.

The opinion of the Court was delivered by

O'NEALL, J. This Court concurs in the ruling of the Judge below, and only on the first ground deems it important to add a word.

To permit secondary evidence of a deed it is necessary that there should be some evidence of the loss.

The loss of the deed must be first shown, at least *prima facie*, before a step can be taken. The Judge must necessarily decide on the showing whether it is sufficient to admit the proof of the existence and contents.

The proof, it is true, in this case looks to be slight, until it is remembered that the deed was traced to the possession of the grantor himself, and who afterwards conveyed to the defendant, and is now out of the State. He was to have the deed recorded; it was delivered to him for that purpose at the door of the clerk's office. It has not been recorded; it is not to be found in the clerk's office, where search has been made.

Jesse Edwards, the grantor, who conveyed after his conveyance to the plaintiffs, was interested to destroy the deed. He is now beyond the power of the Court. Fifteen years have passed since the execution of the deed. These facts make out, I think, a *prima facie* case of loss.

Edwards vs. Edwards.

To this now must be added the verdict of the jury to whom the question of loss was submitted, and as was said by Whitner, J., in *Berry vs. Jourdan*, 11 Rich. 76, "if any doubt has been entertained upon the proof then before the Judge, that doubt must be entirely removed by the sequel in the testimony clearly corroborated by the verdict of the jury."

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, November and December, 1858.

J. M. ROSS, ORDINARY, *vs.* THOMAS N. PETTUS AND OTHERS.

Administration Bond—Pleadings—Ordinary's Decree

An action will not lie on an administration bond in behalf of a distributee, until a decree has been rendered in the Court of Ordinary or Court of Equity against the administrator; it is not sufficient to produce a decree rendered after the action was commenced.

BEFORE WARDLAW, J., AT YORK, FALL TERM, 1858.

These were actions of debt brought, in behalf of different distributees, upon the same administration bond, against the administrators and their sureties.

To show the breach and amount of damages, the circuit decree pronounced by the Court of Equity, (*Pettus vs. Sutton*, 10 Rich. Eq., 356,) was produced. For the defendants it was objected, first, that there should have been a final decree by the Ordinary; and second, that the decree made in Equity was subsequent to the commencement of the suits.^(a) His Honor overruled the objections and the plaintiffs were allowed to consolidate their actions and then take a verdict.

The defendants appealed.

Clawson, for appellants, cited *Ordinary vs. Williams & Parkman*, 1 N. & McC. 587; *Ordinary vs. Osborne*, 2 Rich. 90; *Ordinary vs. Hunt*, 1 McM. 382; *Ordinary vs. Johnsey*, 6 Rich. 358; *Ordinary vs. Mortimer*, 4 Rich. 271.

(a) It does not appear in the report or grounds of appeal, that the actions were commenced before the decree was rendered in the Court of Ordinary. It is presumed that was made to appear, for the first time, in the Court of Appeals. R.

Ordinary vs. Pettus.

G. W. Williams, contra, cited *Ordinary vs. Thomson*, 2 Bail. 339.

The opinion of the Court was delivered by

O'NEALL, J. In these cases it appears that the decree on which the defendants are charged, was not rendered until after suit brought. No action can be maintained on the administration bond in favor of distributees until a decree be rendered in their favor, either by the Ordinary, or the Court of Equity. This has been considered a settled principle from the case of *Simpkins, Ordinary, vs. Powers*, 2 N. & McC. 213, until the present time. It is true, if the decree be rendered before suit brought, and an amendment afterwards, such an amendment will not defeat the action. For the amendment takes place, as if it had always been a part of the decree. *Ordinary vs. Osborne*, 2 Rich. 90; *Ordinary vs. Mortimer*, 7 Rich. 176. So, too, I have no doubt that an appeal from the decision of the Ordinary to the Court of Equity, would not have *necessarily* the effect to defeat an action brought after the Ordinary's decree, but before the appeal was heard in Equity. The case on the bond could not however be heard until the appeal in Equity was decided. If the Ordinary's decree was sustained, in whole or in part, the plaintiff would be entitled to a verdict. If the decree of the Ordinary was wholly set aside, then of course the action on the bond must fail.

In the case of a creditor, the Ordinary has no power to give a decree in his favor; the action can therefore be brought for his benefit on the bond, if he can show that his debt has been judicially established against the administrator, and that he has been guilty of a *devastavit*, or has in his hands assets. *Ordinary vs. Hunt*, 1 McM. 380; *The Same vs. Johnsey*, 6 Rich. 358.

Columbia, November and December, 1858.

It is useless to order new trials, for the plaintiffs cannot recover, inasmuch as the decree of the Ordinary was rendered after suit brought.

Nonsuits are therefore ordered.

WARDLAW, WITHERS, WHITNER and GLOVER, JJ., concurred.

Nonsuit ordered.

Clanton vs. Young.

SHEPHERD CLANTON vs. JOHN D. YOUNG.

Contract—Reward—Condition Precedent.

B. advertised a reward of three hundred dollars to be "paid for the apprehension and delivery to the jail of Kershaw District" of a slave charged with murder. A. apprehended and delivered the slave to a magistrate of Kershaw, who delivered him to a constable, in whose custody he remained until he was tried a few days afterwards and acquitted. *Held*, that A. not having complied with the condition to deliver the slave to the jail of Kershaw district, was not entitled to the reward.

BEFORE GLOVER, J., AT CHESTERFIELD, SPRING TERM,
1857.

The report of his Honor, the presiding Judge, is as follows:

"The plaintiff sued in *assumpsit* to recover the amount of three hundred dollars, which the defendant promised to pay for the apprehension of a slave named Hiram. The following advertisement was published, at the defendant's request, in the 'Camden Journal and Temperance Advocate.'

"THREE HUNDRED DOLLARS REWARD,

"Will be paid for the apprehension and delivery, to the jail of Kershaw District, of Hiram, a negro man, the property of L. W. R. Blair, a fugitive from justice, who stands indicted for the murder of Mrs. Jane Young, committed on Friday, the 11th inst. Said negro is about five feet eight or ten inches high—thick set—has heavy eyebrows with small eyes—holds his hands far back in walking—is said to have a small scar on the back of his hand, from a burn—with a

(a) It is well settled that a promise to pay a reward on the apprehension of a felon, will support an action. *Williams vs. Cardarine*, 5 C. & P. 566; *Lancaster vs. Walsh*, 4 M. & W. 16; Ch. on Con. 10, note (g), 544, note (r). R.

Columbia, November and December, 1858.

scar running through it caused by a cut from a knife. He is about thirty-five years of age, and is quick spoken and intelligent.

“JOHN D. YOUNG.

“*Camden, S. C., Feb'y 22, 1853.*

“‘Raleigh Standard,’ ‘Spirit of the Age,’ ‘Greensboro’ Patriot,’ and ‘Petersburg Intelligencer,’ will copy four times, weekly, and forward bills to this office for payment.”

“Hiram was charged with the murder of Mrs. Young by her family, and was a runaway during most of the year 1853. After about one year the defendant, with Finley McCaskill, brought Hiram, so much reduced that some of the witnesses would not have known him, to Samuel P. Murchison, a magistrate of Kershaw district, who delivered him to Joel Yarborough, his constable, in whose custody he continued until he was tried, a few days after, by a Court of Magistrate and Freeholders. At this Court Samuel P. Murchison presided, and the defendant attended as a witness, and the plaintiff as prosecutor. Hiram was acquitted.

“Murchison lived three or four miles from Blair’s, in the neighborhood of the alleged murder and was the nearest magistrate.

“Alexander Martin lived two or three months, in the spring of 1853, with the plaintiff, ‘as a hireling.’ He once saw Hiram at the spring—about one hundred and fifty yards from the house—and he informed Mrs. Clanton of it. Two or three weeks after this, he saw him in the plaintiff’s crib-loft in the fodder, but he said nothing about it. In the crib he also saw, a dozen times, a greasy tin bucket, like those about the house, and a bottle which appeared to have had milk in it; but ‘he never opened his mouth about it.’ Sam, Hiram’s father, lived on plaintiff’s plantation.

“After the trial of Hiram, the defendant stated, that he

Clanton vs. Young.

would not have hesitated to pay the plaintiff if Hiram had been taken to the jail of Kershaw.

"The jury was instructed, that in construing the defendant's promise, they must look to his intent; that his object was the apprehension of Hiram and his trial for the alleged murder; that when the plaintiff arrested him, it was his duty to procure a commitment, whether as a runaway or as a criminal, and that the defendant's liability did not depend upon a delivery of Hiram to the jail of Kershaw; and that when in the custody of the magistrate, he was authorized to place Hiram in the safe keeping of his constable, until the trial, without a commitment to jail.

"But if they believed that the plaintiff harbored Hiram, or that the apprehension of him was collusive, the jury was instructed to find for the defendant; and as this part of the defence depended on the circumstances stated by Martin, I did say to the jury that it was strange, that he had informed no one that Hiram was seen by him in the crib; but the witness's credibility was submitted to them, without the strong language imputed to the presiding Judge by the fourth ground of appeal.

"The jury found for the plaintiff, three hundred dollars."

The defendant appealed and now moved this Court for a new trial, on the grounds:

1. Because the delivery of the negro Hiram to the jail of Kershaw District, according to the terms mentioned in the reward, was a condition precedent, and should have been strictly performed by the plaintiff, before he was entitled to recover the reward.

2. Because the Court ruled that a virtual performance of the condition precedent was sufficient.

3. Because the Court ruled that the plaintiff's delivery of

Columbia, November and December, 1858.

Hiram to Esquire Murchison, who resided twenty three miles from Kershaw jail, and four or five miles from the place of capture, was a virtual performance of the condition.

Clinton and Austin, for appellants, cited on first ground, *Epperly vs. Bailey*, 3 Indiana R. 72; *Cutter vs. Powell*, 6 T. R. 326; *Boone vs. Eyre*, see Note 1 H. B. 273; *Law vs. House*, 3 Hill, 270; *Breithaupt vs. Thurmond*, 3 Rich. 216; *Tharin vs. Fickling*, 2 Rich. 361; *Glazebrook vs. Woodrow*, 8 T. R. 370; *Jones vs. Barclay*, 2 Doug. 686; *Fultz vs. House*, 6 Smedes & Marsh. 404; Tidd's Pr. 384, and the authorities referred to in note (n); 1 Salk, 171; Tidd's Pr. 385. And on second and third grounds, Steph. N. P. Tit. Assumpsit, 305; *Cutter vs. Powell*, 6 D. & E. 320; 2 Pothier, 41; *Kuykendall vs. Gilbreath*, 3 Pike, 222; 1 Roll, 422, l. 45; 1 Roll, 426, l. 32; Co. L. 209, b; 1 Roll. 427, l. 50; Hob. 134; *Wood vs. Ashe*, 1 Stro. 407; *Pribble vs. Baghurst*, 1 Swana. 329; 3 Hill, 272; 1 Salk. 113.

Inglis, contra, cited 2 Bac. Abr. 334, 335; 2 Johns. R. 307.

The opinion of the Court was delivered by

WHITNER, J. The arguments and authorities adduced would lead us into a general summary of the principles governing matters of contract. In announcing our judgment it is not thought necessary to enter upon such an enlarged discussion.

This contract is in writing, and there is no dispute about its terms. The performance by the plaintiff of the services stipulated for by the defendant fixes the liability of the latter. The promise to pay was founded on the *apprehension* and *delivery to the jail* of Kershaw District, a certain negro slave, an alleged fugitive from justice, charged with murder. The performance proved was an apprehension and delivery to a

Clanton vs. Young.

magistrate of the district, by whom the slave was delivered to a constable, in whose custody he continued until a trial was had.

This was not a strict compliance with the terms stipulated. Was it a substantial compliance, such as should entitle the plaintiff to the reward which had been offered?

This Court has reached a conclusion adverse to the plaintiff, and the facts disclosed perhaps well illustrate the substantial difference. But it is proper, and we prefer to apply the test upon general considerations.

The delivery of a slave in the jail and at the Court House, places him in the midst of general and professional intelligence, and usually in a community free from any neighborhood feeling or improper bias.

Such a delivery would contemplate such participation on the part of those to whom it appropriately belonged, in the conduct of the prosecution, as would be proper to secure the ends of justice, at least to the extent of securing a suitable presiding officer, and an intelligent and impartial jury. Such considerations have often moved the public mind to legislation on this subject.

If such means and ends are contemplated by a party offering a reward, the service is very inadequately performed, if in a given case the slave is delivered to a magistrate every way unsuited, and for reasons that need not be suggested the trial promptly proceeded with, and the prosecution conducted by a stranger, or a partisan of the owner, and in a neighborhood remote from the Court House, the very atmosphere of which may be infected with improper influences.

The facts are all before the Court, and we do not see any purpose to be accomplished by protracting this litigation.

The verdict of the jury is set aside and a nonsuit is ordered.

WARDLAW, WITHERS and MUNBO, JJ., concurred.

Nonsuit ordered.

Columbia, November and December, 1858.

THE TOWN COUNCIL OF WINNSBORO *vs.* SELDEN M. SMART.

Corporation—Ordinance—Markets—Trade.

The Town Council of Winnsboro have the power to pass an Ordinance prohibiting the sale of butcher's meat within the corporate limits, except at the public market.

Laws regulating markets are not in restraint, but in regulation of trade—they are not in violation of the ordinary rights of the citizen.

BEFORE WARDLAW, J., AT FAIRFIELD, FALL TERM, 1858.

An ordinance of the Town Council of Winnsboro, provides, "That no person or persons shall sell any butcher's meat within the corporate limits of the Town of Winnsboro, until after the hour of nine o'clock in the morning, excepting in the town market. And every person or persons who shall violate this ordinance shall be subject to a fine of ten dollars for each and every offence."

The defendant was fined by the Intendant under this ordinance, ten dollars, and he appealed to the Circuit Court. His Honor, the presiding Judge, affirmed the judgment of the Intendant, and the defendant appealed to this Court, on the grounds:—

1. Because the ordinance is contrary to the general laws of this State, and is not authorized by the charter of said town.

2. Because the appellant sold the meat *inside of his own blacksmith shop*, and not in the streets or public square of the town; and it is not pretended that there was any nuisance created by his so doing—and to deprive him of this right, under the circumstances, would be to establish a monopoly,

Winnsboro vs. Smart.

and punish him for the violation of an ordinance which is itself in violation of law.

Rutland, for appellant, cited 11 Stat. 505, § 4; *Dunham vs. Rochester*, 5 Cow., 462; *New York vs. Ordeman*, 12 Johns. R., 122.

Rion, contra. The Act of Incorporation, (11., Stat. 506, § 4,) gives the Town Council full power to make ordinances respecting the "*markets*," and for preserving the "*health*, order and good government" of the town. The subject-matters of an ordinance respecting the *markets*, are the *place*, the *time*, the kind and quality of articles to be sold, and the sellers. Markets are from their very nature *sanatory* institutions; and are *ex necessitate* nuisances to those who reside in the neighborhood. Hence the ample powers always conferred on municipal corporations respecting them. Markets are institutions of great antiquity; and, although a species of monopoly, have always been held in law to be *regulatory* of, and not in *restraint* of trade. *Mosley vs. Walker*, 7 Barn. & Cress., 40. *Mayor and Aldermen of Macclesfield vs. Pedley*, 4 Barn. & Adol., 397. In this case the market was a meat market, and butcher shops were not allowed out of the market place. Both cases rest on *custom*: but no custom is good against which a good *legal* reason can be assigned.—1 Bl. Com., 77. In our case, the Act of the General Assembly stands in lieu of custom. A greater exercise of power than in this case sanctioned in *City Council vs. Benjamin*, 2 Strob., 521; *City Council vs. Ahrens*, 2 Strob., 241; *Heisembrittle ads. City Council*, 2 McM., 233. The language of the Court in *City Council vs. Goldsmith*, 2 Sp. 435, very apposite to this case.

The opinion of the Court was delivered by

WARDLAW, J. The defendant has mainly urged that the

Columbia, November and December, 1858.

ordinance in question is not within the power delegated to the Council, because it is in restraint of trade, and in violation of the ordinary rights of a citizen, and therefore repugnant to the laws of the State. For authority he has referred to the case of *Dunham vs. Rochester*, 5 Cow., 462.

The general principle maintained in that case, that a by-law must appear to be within the power granted to a corporation, we freely admit: the application which was made of the principle to the charter and ordinance, considered in that case, we will not undertake to examine. Turning to the argument of the plaintiff, we find that markets with exclusive privileges are of great antiquity and universal prevalence; that they have been deemed useful to both producers and consumers, and moreover serviceable in respect to health and good order: that a distinction is recognized between the restraint of trade and its regulation, and that by the Act incorporating Winnsborough (11 Stat., 505, § 4,) plenary power, subject to the laws of the State, is given to the Council, concerning markets, health and good order. The cases which have been decided in our own State leave no doubt that the Council of Winnsborough had power to pass the ordinance now in question, and that its expediency was a matter for the sound judgment of the Council, over which no supervision can be exercised by a Court. (See 2 McM., 233; 2 Speer, 435; 4 Strob., 241.)

The motion is dismissed.

O'NEALL, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Bearden vs. Smith.

E. BEARDEN vs. E. P. SMITH.

Contract—Penalty—Liquidated Damages.

By written contract, not under seal, S. acknowledged himself to owe or to forfeit to B., one hundred dollars, "if there should be default made in the condition underwritten," which was that S. should, by a certain day, put B. in possession of a certain house and lot:—*Held*, that the one hundred dollars was a penalty and not liquidated damages.

BEFORE O'NEALL, J., AT SPARTANBURG, FALL TERM,
1858.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Bobo, for appellant.

Dawkins, contra.

The opinion of the Court was delivered by

GLOVER, J. In January, 1856, the plaintiff purchased of the defendant a tract of land, on a part of which Mary Groce then lived. At the time of the purchase the defendant executed the following instrument:—"Be it remembered that I, E. P. Smith, acknowledge to owe, or to forfeit to Eber Bearden one hundred dollars, good and lawful money of said State, if there should be default made in the condition underwritten. The condition above written is such, that if the above bounden E. P. Smith shall put him, the said Eber Bearden, on or before the first day of March, 1857, in actual possession of the house and lot whereon Mary Groce now lives, in this district, and has now in possession, then this bond to be null and void, otherwise to remain in full force and virtue." The plaintiff was not put in possession of the

Columbia, November and December, 1858.

house and lot occupied by Mary Groce, until about one week after the time appointed and agreed upon, and he sued, alleging this breach. At the trial before O'NEALL, J., at Spartanburg, it was argued that the sum of one hundred dollars, specified in the above agreement, was stipulated damages, and not a penalty. The Judge instructed the jury otherwise, who assessed the plaintiff's damages, including a payment before made, at seven dollars and fifty cents; and for misdirection on this point the plaintiff has appealed.

Whether the parties have assessed damages for themselves, or whether the amount specified is to be regarded as a penalty, is a question of law, and the decision of it depends upon the intention, to be collected not only from the language employed, but we must also look to the form of the instrument. The defendant acknowledges his indebtedness in a specific sum with a condition, to be void if the plaintiff shall be put in possession of the house and lot on a certain day. His promise to perform the act is implied from the condition under a penal sanction; and in form the instrument is not unlike a bond, in which the penalty is a security for the damages sustained by the breach of the condition. The parties to this agreement have manifested no intention to make the sum stated the measure of damages, either by the use of the words "liquidated damages," or by the form of the instrument. In bonds conditioned for the payment of money or for the performance of a particular act, the gross sum is always treated as a penalty; and the striking conformity of this contract to such a bond, admits the application of the same rule to its construction. The distinction between a penalty and liquidated damages is, that the former is a security for, and the latter is to be paid in lieu of, the performance of the act to be done. The form of this instrument shows that a penalty was in the contemplation of the contracting parties, and that precludes the idea of assessed damages, as a substitute for performance, unless by the use

Bearden vs. Smith.

of express words, as "liquidated damages," a different intention is shown.

Contracts for stipulated damages will be enforced, although the sum be largely disproportioned to the actual damages; but the intention must be clearly manifested.

Even the use of the words "liquidated damages" will not control in ascertaining the meaning, if, upon the whole instrument taken together, a different purpose is discovered. (*Green vs. Price*, 13 M. & W. 701.) And where it is doubtful if the sum fixed was intended to be for damages, assessed by the parties in anticipation, or as a penalty, the Court will adopt the latter: (*Crisdee vs. Bolton*, 3 C. & P. 240,) preferring, in a case of doubt, that construction which will give just and full compensation, rather than adopt that which without reference to the real damage is arbitrarily settled before a breach of the contract is committed.

In the case of *Allen vs. Brazier & Randolph*, relied upon in the argument, (2 Bail. 293,) the defendants expressly promised to deliver a negro, or pay one hundred dollars; but there was no declaration of indebtedness, nor did the instrument, as in this case, assume the form of a bond, from which the intention to bind the party by a penalty might have been inferred. It was a conditional agreement—to deliver the negro or to pay the sum stipulated—and on failure by the defendants to perform their undertaking, the *quantum* of damages was ascertained.

Looking to the form of the instrument, and the language used by the parties, we are of opinion, that they intended to provide for the delivery of possession under a penalty of one hundred dollars; and that the ruling of the Circuit Judge was correct, in submitting to the jury the question of damages.

Motion refused.

O'NEALL, WARDLAW, WITHERS, WHITNER and MUNRO, JJ., concurred.

Motion refused.

Columbia, November and December, 1858.

DANIEL ZEIGLER *vs.* MOSES BRADY AND OTHERS.*New Trial—Special Damages.*

Where at the trial of an action on the case for obstructing a private right of way, the Judge charged the jury that they might give *consequential* damages: *Held*, that, if by *consequential* the Judge meant *special* damages, still defendant was not entitled to a new trial, it appearing that he could in no way have been injured by the charge, there being no allegation or proof before the jury of such damages, and the verdict being under the circumstances not too high.

BEFORE MUNRO, J., AT ORANGEBURG, FALL TERM, 1858.

The report of his Honor, the presiding Judge, is as follows.

"This was an action on the case brought by the plaintiff against the defendants, for the obstruction of a private right of way through the lands of the defendant, Moses Braddy. The jury found for the plaintiff, eight hundred dollars. It was not stated in any of the counts of the declaration, that the plaintiff had sustained any special or consequential damage from the acts of the defendants. I charged the jury, however, that they might, notwithstanding, give such actual and consequential damages as they believed the plaintiff had sustained."

The defendants appealed on the ground:

Because his Honor erred in charging the jury that they could give consequential damages, when none were charged in the declaration.

Hutson, Bellinger, for appellants, cited 1 Chit. Pl. 399; 2 Green. Ev. § 224; 1 Saund. Pl. & Ev. 344, 136, 925; *Rowand vs. Bellinger*, 3 Strob. 375; 11 Rich. 288; *Harrison vs. Berkley*, 1 Strob.

Glover, contra, cited 2 Wheat. Sel. 1141.

Zeigler vs. Braddy.

The opinion of the Court was delivered by

WHITNER, J. The ground of appeal alleges error on the part of the Circuit Judge in his instructions to the jury on the subject of damages.

This was an action on the case brought for the obstruction of a right of way through the lands of one of the defendants. We are informed by the report prepared by counsel, that it was not stated in any count in the declaration that the plaintiff had sustained any special damage from any act of the defendant; and we learn further that this was a third action for the same cause; that no objection was made to any evidence offered; and that, in point of fact, there was not any evidence received of any special damage sustained.

There is some confusion in the terms used on the matter of damages, as set forth in the report and ground of appeal; and we might be at some loss to apprehend with certainty the precise character of the complaint, but the written argument submitted by counsel explains very fully the sense in which he is to be understood. "By *consequential damages* is meant those damages which, though the natural consequences of the act complained of, are not the necessary result of it, and such as are generally termed in the books *special damages*."

The validity of the declaration is not called in question, as it is conceded in the argument, that in order to sustain this action it was not necessary to allege and prove any special damage.

We have no complaint of the admission of incompetent testimony; for "whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not *implied* by law, then in order to prevent the surprise on the defendant which might otherwise ensue on the trial, the plaintiff must in general state the particular damage which he has sustained or *he will not be permitted to give evidence of it.*" 1 Chit. Pl., 396. Where the law pre-

Columbia, November and December, 1858.

sumes a damage to the plaintiff from the facts alleged, no special damage need be alleged. 11 Pick. 484; 18 Ves. 386.

In the case before us, no such objection was made; and for the reason, as we are now informed, no such evidence was offered or urged in the argument, and we are at a loss to perceive in what way possible, injury could result, even upon the theory now presented by appellant. Without raising any issue as to the precise instructions given to the jury, it is manifest that the verdict was not, because it could not, from the nature of things, be based on such considerations as constitute the grounds of present complaint.

The jury were properly told it was competent for them to give punitive or vindictive damages; and surely if a third resort to a legal remedy was rendered necessary, this was a wholesome administration. The amount of the verdict under such circumstances does not furnish the slightest presumption that the jury labored under any mistake.

It is said no injustice will be done by sending the case back, the end to be attained being to inform the defendant of the specific ground upon which damages are claimed, that he may be prepared to meet them. Yet, it is well replied, the declaration already contains all that may be truthfully alleged; such damages only are claimed as the law presumes or implies to have accrued from the wrong complained of; no injustice has been done by surprise to the defendant in hearing testimony that should have been excluded; there is no room to conjecture that the verdict was given without sufficient evidence or upon a false assumption of facts.

The motion for a new trial is dismissed.

O'NEALL, WARDLAW, WITHERS, and MUNRO, JJ., concurred.

Motion dismissed.

Myers vs. Griffis.

EDITH MYERS, BY NEXT FRIEND, vs. MARY GRIFFIS AND
CARMA POWELL.

Husband and Wife—Pleadings—Trover.

A wife cannot, by appointing an attorney under the Act of 1712, maintain trover in her own name, for the conversion of a chattel in which she has the legal title with right of immediate possession, even though she be living apart from her husband and he interpose no claim.

Where the wife acquires the legal title in severalty to chattels with right of immediate possession, the title becomes instantly vested in the husband, and he may sue alone for a conversion of them.

BEFORE WITHERS. J., AT DARLINGTON, FALL TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"The action was trover for cattle, (twenty-five head, I believe, were claimed,) brought by Edith Myers, who had executed a power-of-attorney under the 16th section of the Act of 1712, she being a married woman, but having, for a series of years, twelve or fifteen, lived separate and apart from her husband. The pleas were the general issue and the statute of limitations.

"Carma Powell was the son of Mary Griffis, and her husband, Kindred Griffis, who died some six or seven years ago, was the brother of the plaintiff. There was a good deal of evidence given, but I shall report only so much as gives origin to the ground of appeal.

"The plaintiff had lived at the house of her brother for some time: then went to North Carolina for years—returned, and now lived with some man, not her husband. In the life time of Kindred, her brother, neighbors had observed that hogs on his premises were in one sort of mark, and cattle in another; and, in relation to this, he had several times said

Columbia, November and December, 1858.

that the hogs were his own, and the cattle Edith's; that he did not own a cow.

"The cattle so marked were in Kindred's possession twenty years or more, and he killed some, and (except his acknowledgments) he treated them as his own. Upon his death, his widow, Mary, the defendant, administered upon his estate, and, with the assistance of Carma Powell, had the cattle sold, treating them as a part of her husband's effects. During all this time, no movement of Peter Myers towards asserting any right to the property appeared to have been made.

"Defendants moved for a nonsuit upon the ground that this was not a case in which the plaintiff could sue; that the husband's right was exclusive by the law marital. I refused the nonsuit, and the jury rendered for the plaintiff a verdict for \$150.

"A copy of the 16th section of the Act of 1712 is subjoined nonsuit in this for convenient reference." (a)

The defendants appealed and renewed their motion for a Court, on the ground :

(a) The copy is as follows :

"And whereas, by this Act, a person being a *feme covert*, is limited as to the time of laying claim to lands or tenements, and to commencing actions or suits of law, and not excepted generally until discovery, and that such person may be no way prejudiced by the same. Be it further enacted by the authority aforesaid, that in case any *feme covert* have any right or claim to any lands or tenements within this Province, or any other action or suit whatsoever, such *feme covert* shall have power to constitute an attorney under her hand and seal to prosecute such her claim, action or suit, either in her own name or in the name of her husband and self, as if her husband had joined with her in such power of attorney; and such person so constituted shall have power to prosecute such suit or claim to effect, and her husband shall not have power to abate, discontinue or release her claim or action, without her voluntary consent, given in open Court and recorded in the proceedings; neither shall such suit or action be in any way abated upon the account of such woman being under coverture; but the proceedings shall be in all things as good and effectual in law as if such woman was sole, and joined her husband with her in such suit; any law, statute, act or usage, or custom, in this Province, to the contrary notwithstanding."

Myers vs. Griffin.

That the sixteenth section of the Act of 1712, under which the plaintiff brought her suit, does not apply where the right of the husband to commence the action in his name alone, for the conversion of chattels, is perfect and complete.

Moses, for appellant. As to the effect of marriage on the personal goods of the wife, whether before, or coming to her during coverture, cited *Roper* 1, 169. For her specific chattels in hands of third persons, the husband must alone bring trover, detinue, &c., *McQueen* 46; 1 Ch. Pl. 65, 51; *Fryerson & Fryerson*, Strob. 3, 461; *Robards vs. Hutson & Price*, 3 McC. 475; *Sansey vs. Gardner*, 1 Hill, 191. Legal estate in wife, with right of immediate possession of a personal chattel in severalty, the marital rights of husband attach and vest the property in him. Chancellor Harper, in *Hill vs. Hill*, 1 Strob. Eq. 23, says: "The rule, is well known, that if there be a perfect legal title, and the present right of possession, this is enough to vest the property in the husband, though there may be no actual manual possession."

Dargan, contra, cited 2 Bail. 349; 1 Bail. 369; 11 Rich. 196; 4 Strob. 469; 3 D. & E. 631; Com. Dig. Abatement, E. 6; 12 M. & W. 97; 1 Sp. 213.

The opinion of the Court was delivered by

O'NEALL, J. This case assumes a ground greatly beyond that of *Guphill vs. Isbell*, 2 Bail. 349. That merely decided that where a feme sole commenced an action of trover, and married *pendente lite*, a replication to the plea of coverture *puis d'avein continuance*, confessing the marriage, but setting out that under the 16th section of the Act of 1712, she had constituted an attorney under hand and seal to prosecute the said suit, would prevent an abatement of the suit. The present case

Columbia, November and December, 1858.

assumes, that such an act done at the beginning of a suit for personalty would defeat the marital rights of the husband.

Judge Harper in reasoning out his conclusions in *Guphill vs. Isbell*, points out in a single sentence the gist of the whole matter. "The Act (he says, speaking of the 16th section of the Act of 1712,) certainly removes her disability to sue, in her own name, *as a feme sole*, upon the appointment of an attorney."

This is all which the Act in words or intendment accomplishes.

That personal property of the wife, to which she has a present legal right, vests, *jure mariti*, in the husband, is an undisputed legal maxim.

Mr. Roper, in his excellent legal treatise on Husband and Wife, at page 166, tells us, that "marriage is an absolute gift to the husband of all the goods, personal chattels and estate of which the wife was actually and beneficially possessed, at that time in her own right, and of such other goods, and personal chattels as come to her during the marriage." 1 Rop. Hus. and Wife, 166.

Under this plain, well-settled principle, can there be a doubt that the cattle in dispute are the property of the husband? That he and his wife have not for many years lived together cannot alter the law.

He may on demand and refusal, or other proof of conversion, unless barred by the statute of limitations, sue for and recover from these very defendants the value of the cattle now in dispute: and if this recovery could stand, it would be no bar to his recovery.

For he may sue alone for his wife's property accruing to her after marriage, 1 Rop. 210, So, too, it is plain from the principle stated in 1 Roper, 166, he can sue alone for her personal property, at marriage.

The case of *Saussy vs. Gardner*, 1 Hill, 191, in which I delivered the opinion of the Court twenty-six years ago,

Myers vs. Griffin.

which ruled, as I am now holding, that "where the wife has a legal estate, in personal chattels, and the right of immediate possession in severalty, the marital rights of the husband will attach and vest the property in him," is a clear and decisive authority against the decision below.

This is not, as I understand, questioned now. But it was supposed that the power given to a wife to sue as a *feme sole*, by constituting an attorney, might so far overrule the husband's legal estate in her goods as to permit her to recover.

This effect, however, cannot be given to the Act. The motion for a nonsuit is granted.

WHITNER, GLOVER, and MUNRO, JJ., concurred.

WITHERS AND WARDLAW, JJ. We construe the 16th section of the Act of 1712 thus: that in all actions whatsoever in which, by the rules of the common law, the husband and wife must join or may join, the wife may bring her writ by virtue of this section. If such be not the interpretation, her right to bring her action will be limited to the class of cases wherein the husband would, at common law, be obliged to join her name; and thus restrict very comprehensive words of a remedial statute within such bounds, that, in such cases as the present the statute of limitations, of five years, would bar the wife of interests which an obstinate, or thrifless, or insolvent, or absent husband neglected; a result which does not seem to comport with the fair scope of the Act. It does not seem logical to test the question by the common law standard of marital rights, for the legislation is clearly an invasion and abrogation of the common law rule of pleading, and practice; nor does it seem congruous to dwarf the *feme covert's* rights, touching personal actions, bestowed upon her on account of disability, while the Act of 1774 has enlarged her protection, touching real estate, until two years after the removal of her disability.

Motion granted.

Columbia, November and December, 1858.

N. SIMS, SURVIVOR, *vs.* CHARLES SMITH AND OTHERS.*Copartnership.*

After dissolution of the firm, and notice to the debtor not to pay a certain partner, the debtor will not be discharged by taking from that partner a receipt for the debt, the consideration of the receipt being a release of the private debt of such partner to the debtor.

BEFORE O'NEALL, J., AT ABBEVILLE, FALL TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"The plaintiff Sims, and Clark, were joint contractors to put up a building, at Cokesbury, for the defendants. The building was completed; and after being so completed, Sims gave notice to the defendant, Smith, the treasurer, not to pay Clark anything. The defendant, however, on the 16th February, 1855, did pay him the sum of three hundred and twenty-four and a half dollars, which included an individual debt by Clark to Smith. Clark gave a receipt in the name of Sims and Clark, for this sum. I held that his receipt must have effect."

The plaintiff appealed on the ground,

Because his Honor held that the defendant Smith, (Treasurer of the Board of Trustees,) could discharge, *pro tanto*, the debt of defendants to the partnership of Sims and Clark, by taking the receipt of Clark after the dissolution, the consideration of which was Clark's individual indebtedness to the defendant Smith. And this was held to be law, although it was in proof that Smith had been notified by the plaintiff, not to pay anything to his co-partner Clark, since deceased, as he was insolvent.

Sims vs. Smith.

Noble, for appellant, cited Story on Part. § 128, 132, 133, note 2; *Frankland vs. Gentry*, 1 Knap. R. 315; *Dob vs. Halsey*, 16 Johns. 38; *Gainsvort vs. Williams*, 14 Wend. 135; *Rogers vs. Batchellor*, 12 Peters, 229, 232; *Everingham vs. Ensworth*, 7 Wend. 326; Story on Ag. §§ 125, 181, 413; Story on Part. § 280; *Hall & Co. vs. Coe & Co.*, 4 McC. 136; *McKee & Co. vs. Stroup*, Rice, 291; *Ramey & Co. vs. McBride & Co.*, 4 Strob. 14.

Jones, contra, cited 4 Car. & P. 108; 9 Wend. 120; Story on Part. § 328; 1 Camp. 392; 15 Ves. 199.

The opinion of the Court was delivered by

MUNRO, J. The report of the Circuit Judge states, that the plaintiff Sims, and one Clark, were joint contractors to put up a building, at Cokesbury, for the defendants. This undoubtedly constituted them partners, *quoad hoc*: and upon the completion of their contract, or the accomplishment of the entire business for which the partnership was formed, it *eo instanti* terminated. Story on Partnership, Sect. 280.

The single question then, is, whether the defendant Smith, could discharge *pro tanto*, the debt of the defendants to the firm of Sims & Clark, by the release of Clark's individual indebtedness to himself.

In the same work, at Sect. 128, the rule is thus stated—“Every contract in the name of the firm, in order to bind the partnership, must not only be within the scope of the business of the partnership, but it must be made with a party who has no knowledge or notice that the partner is acting in violation of his obligations and duties to the firm. For every such contract, made with such knowledge or notice, is not binding upon the partnership, however binding it may be upon the individual partner making it.” And at Sect. 132, the author goes on to say—“Similar principles will apply

Columbia, November and December, 1858.

although not always to the same extent, or with the same certainty, when one partner applies the funds, or securities, or assets of the partnership in discharge or payment of his own private debts, claims or contracts. In all such cases the creditor dealing with the partner, and knowing the circumstances, will be deemed to act *mala fide*, and in fraud of the partnership; and the transaction by which the funds, securities or other effects of the partnership have been so obtained will be held as a nullity."

The mere fact, however, that a note or security, or fund of the firm has been taken in payment of the separate debt of one of the partners, is by no means decisive of collusion or fraud, but on the contrary may be rebutted by the circumstances of the particular case. See the whole doctrine discussed at Sect. 133, and the notes appended thereto.

The same doctrine was held in the case of *Hall, Kirkpatrick & Co. vs. Coe, et al.*, (4 McC. 136,) in which case it was ruled, that one of several copartners may discharge his individual debt to a third person, by releasing, or giving a receipt to such person for a debt due by him to the firm. That case is however distinguishable from the present, in two important particulars; in the first place, the release of the individual partner was given before the dissolution of the firm—and secondly, no notice had been communicated to the creditor of the individual partner, not to deal with him. In delivering the opinion of the Court, Judge Nott, in addressing himself to that branch of the case, remarks: "It is admitted in this case, that if the receipt was given after the partnership was dissolved, and after it was known to the plaintiffs, they could derive no benefit from it."

In the case in hand, the partnership had not only expired before the transaction between the defendant Smith and Clark took place; but in addition thereto, the former had express notice not to pay anything over to Clark.

Sims vs. Smith.

We are, therefore, of opinion, that there was error in the instructions to the jury, that Clark's release of the copartnership demand, in consideration of his individual indebtedness to the defendants, was binding upon the plaintiff.

Wherefore the plaintiff's motion is granted.

O'NEALL, WARDLAW, WITHERS, WHITNER, and GLOVER, JJ., concurred.

Motion granted.

Columbia, November and December, 1858.

JOHN G. MOORE *vs.* JOSEPH SMITH.*Trover—Administration on estate of living person.*

Trover by A. against B. for the conversion of a slave. It appeared that A. had been absent from the State for more than seven years unheard of; that thereupon letters of administration of his goods and chattels were granted; that his estate was distributed, and the slave allotted to a distributee, whose agent sold her to B.:—*Held*, that plaintiff was entitled to recover, the supposed letters of administration being null and void.

Letters of administration on the estate of a living person are null and void *ab initio*—the application upon which they were granted, whether based upon positive testimony, or the presumption arising from an absence unheard of, of seven years, being *coram non judice*, and no one claiming under the administrator can be protected against the title of the living owner.

BEFORE WARDLAW, J., AT YORK, FALL TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:
“Trover for a negro woman named Malinda.

“The plaintiff being in 1845 a young physician, whose father had been a man of distinction in York, left this State in the spring of that year, intending, as he said, to hunt a place in the West for the practice of his profession. He left in the hands of Dr. Wright, his agent in York, six negroes; and was moreover entitled to a share of valuable real estate. He was not afterwards heard of; and in December, 1852, his agent and another person obtained letters of administration on his estate, under the presumption of his death. These administrators made their final return to the Ordinary in January, 1855, showing that the residue of the personal estate of their supposed intestate, had been distributed between his five brothers and sisters, his next of kin. In the distribution, each distributee gave a receipt to the

Moore vs. Smith.

administrators for a negro, according to the value which had been fixed by appraisers, and commissions were charged on the whole amount as cash.—Malinda, a valuable young negro woman, was received by the agent of Jacob A. Moore, one of the brothers, who then lived in Texas, and has since died. This agent sold her at the price fixed by appraisement, six hundred and fifty dollars, to the defendant, who acquired possession of her in July, 1853.

“In June, 1857, the plaintiff unexpectedly returned to this State, having, as it was said, been living in the South-west corner of Alabama, without intercourse with any person here. He made no motion toward revocation of the letters of administration, but on the 27th of June, 1857, commenced this action after demand and refusal.

“After argument, I held the letters of administration to be void, as the Court of Ordinary had no jurisdiction in the matter before the death of the intestate, and the presumption of fact on which that Court acted, had been conclusively rebutted.

“Under my instructions, the jury found for the plaintiff, the value of Malinda and her hire, which they fixed at one thousand one hundred and sixty-three dollars.”

The defendant appealed, and now moved this Court for a new trial on the grounds:

1. Because his Honor erred in instructing the jury that the administration granted on the estate of plaintiff, founded on the legal presumption of his death, was void *ab initio*, and did not carry with it the legal consequences of a valid administration.

2. Because the defendant being an innocent purchaser, and deriving his title from said administration, was entitled to protection as fully as if he had purchased directly from the administrators.

Columbia, November and December, 1858.

3. Because the plaintiff was not properly before the Court, not having first moved a revocation of the letters of administration granted on his estate.

Wilson, Melton, for appellant.

First Ground.—One absent without being heard from for seven years is, in law, presumed to be dead.—1 Phil. Ev. 159; 24 Wend. 221; 4 Whart. 173; 6 East, 80–85; *Craig vs. Craig*, 1 Bail. Eq., 105; Stat 1 James, 2 Stat. 503.

In this case the rule applied, and the granting of administration was a legal consequence that followed the presumption. As in the case of second marriage, where first husband not heard from for seven years, such marriage held valid and children legitimate. *Woods vs. Woods*, 2 Bay, 479.

Second Ground.—*Price vs. Nesbitt*, 1 Hill Ch. 461; *Benson vs. Price and Byers*, 2 N. & McC. 577; 1 Wms. on Exr's, 486, n. 1; *Poag vs. Carrol*, Dud. 1.

Third Ground.—The letters of administration until revoked furnish conclusive proof of the death. The fact of the death does not stand on a presumption, but on the adjudication of the Probate Court. *Neuman vs. Jenkins*, 10 Pick. 515; 2 Phil. Ev. (C. & H.) 489, n. 381.

A probate or grant of letters of administration as long as they remain unrepealed, cannot be impeached in the temporal Courts. *Allen vs. Dundas*, 3 T. R. 129; Dud. 5; 1 Wms. on Exr's, 450–459.

Letters of administration may be revoked in two ways. By suit by citation, or by appeal to a higher tribunal. 1 Wms. on Exr's, 462; 11 Stat. 42, Act 1839.

G. W. Williams, contra, cited Shelf. on Mar. & Div. 706; 1 Wms. on Exr's, 374; *Holyoke vs. Haskins*, 9 Pick. 259; *Allen vs. Dundas*, 3 T. R. 125; 1 Wms. on Exr's, 400; 2

Moore vs. Smith.

Leigh, 719; *Moon vs. Tanner*, 5 Monroe, 42; *Payne's Will*, 4 Mon. 422; *King vs. Bullock*, 9 Denio, 41.

The opinion of the Court was delivered by

WARDLAW, J. Many *dicta* may be found to sustain the proposition that administration granted of the goods of a living person is entirely void; (1 Wms. on Ex'rs, 461; 15 Sergt. & Rawl., 42; 5 Monroe, 46;) but all of these rest upon a *dictum* of BULLER, J., in *Allen vs. Dundas*, 3 T. R., 129, and that, so far as I can find, upon general principles and the unquestioned opinion prevailing in both the civil and the ecclesiastical Courts of England. It is rather strange, that, with the general application which has been made of the presumption of death from absence, unheard of for seven years, and especially in this land of migration, some case does not appear in the reports, where a person, who had been presumed to be dead, reappeared to supersede his administrator. A case, which I think is similar in principle, may be seen in 1 Phil., 83. There, Charles James Napier, Esquire, having in the Peninsular war of 1808, been left for dead on the field of battle, and been reported amongst the slain in the dispatches of Sir John Hope, his will was admitted to probate upon the affidavit of his brother; upon his return to England, the probate was revoked as granted in error, and was declared to be null and void to all intents and purposes whatsoever in the law, and the original will with the cancelled probate was delivered to him.

The defendant in the case now before us distinguishes this case from that of Napier's in three particulars, which he deems important:—first, the action of the Ordinary there was not based, as here it was, on the presumption of death,—the legal presumption as the defendant calls it; second, there no right of an innocent purchaser intervened, as here it does;

Columbia, November and December, 1858.

third, there the probate was revoked, but here the grant of administration is yet subsisting.

I. The presumption may be of great antiquity and of frequent use, but still it is only a presumption of fact, to which artificial force has been given beyond its natural effect upon belief. There are not, in reference to this subject, two kinds of death, as has been said at the bar, actual and presumptive, but two kinds of evidence, direct and circumstantial, which may be given of death. Upon whichever of the kinds of evidence the Ordinary acts, the fact of actual death is, by his grant of probate or of letters of administration, assumed to have been proved. When the assumption was founded on direct evidence, it seems to be conceded that undeniable disproof of it annuls the act of the Ordinary; for no one has ventured to maintain that a person should be deprived of any right, because in his temporary absence a witness, wilfully or through mistake, gave on oath a false account of his death, and thereupon there was speedy administration of his goods. The difference, if any, would not be in favor of this defendant, where the Ordinary should act, not on the direct testimony of witnesses, but upon inferences drawn from such circumstances, shown by testimony, as these:—the person whose death was to be established went to sea in a storm, fragments of the vessel he went in were found, and he was not heard of for six months afterwards. And it is only adopting evidence of death, which, however truthful in the ordinary course of human affairs, is really less likely than the circumstances just mentioned to produce belief, when the Ordinary acts upon the presumption that arises from absence for seven years, unheard of. Many administrations have been granted on the presumption. Courts have made distribution in conformity with it; and it is urged that if the Ordinary had refused to act on it, he would have been compelled by a higher tribunal to do so. This may be admitted, for by *mandamus* or order made upon appeal, the

Moore vs. Smith.

Ordinary would be compelled in any case to act according to a just judgment of the evidence presented to him, whether direct or presumptive. But his action when performed under compulsion, would have no greater validity than if it had been the voluntary result of his own judgment. If, in the latter case, it would fall upon removal of the fact which constituted its foundation, so it would do in the former one.

II. This defendant is really a purchaser not from the administrator, but from one who, without other consideration than his claims as next of kin, was permitted to succeed to the plaintiff's rights:—and in no case does the plea of purchaser for valuable consideration without notice, of itself, avail at law, or even in Equity against a legal title. But in the most advantageous position which under this head the defendant could occupy, his resistance of the plaintiff's title would be ineffectual. It is true that in some instances of void probates or void grants of administration, a distinction is made between the wrongful executor or administrator, and his innocent alienee, in favor of the latter; (1 Wms. on Ex'rs, 490; *Graysbrook vs. Fox*, Plow., 276;) but this favor to the alienee is shown only where the act of alienation was done in due course of administration; and in reference to such act the wrongful executor or administrator and the alienee are put on the same footing as when alienation has been made by a more common executor *de son tort*. (1 Wms. on Ex'rs, 223; *Coulter's case*, 5 Co. R., 30^b; *Parker vs. Kett*, 1 Ld. Ray., 661.) Of the goods of a living person, there can, however, be no due course of administration; in their alienation, as if the owner were dead, there can be no executor *de son tort*,—no wrongful administrator,—nothing but unauthorized interference—at the very least misconception of fact inducing misapplication of terms,—when the truth appears, solecism and absurdity resulting in tortious violation of right, if the error be not corrected.

The purchaser relied on a grant made by a Court of com-

Columbia, November and December, 1858.

petent authority, and it is said that such grant is itself a conclusive confirmation of the presumption upon which it was made. It is plain, as was decided in the case of *Newman vs. Jenkins*, 10 Pick., 515, which has been cited for the defendant, that a debtor sued by the supposed administrator in the absence of the plaintiff, would not have been permitted, under the plea of the general issue, to urge circumstances for the purpose of showing that the supposed intestate was alive and the administration therefore void. But can it be said that the presumption of the death of the plaintiff, who is now standing in Court, has been conclusively confirmed? Answering no, the defendant insists that upon the presumption sanctioned by law, and the honest belief thereby induced, judicial action was had, and in faith of that his purchase made. The unlucky predicament of the purchaser is the same that every one falls into who relies upon the action of a public functionary in a matter not within his sphere. The mistake has been in supposing that there was any judicial action. The whole proceeding was *coram non judice*: for the Ordinary had no more power to grant administration of the goods of a living person, than a Sheriff would have to usurp the Ordinary's jurisdiction over the goods of a deceased person. In granting probate of a forged will, or of a former will when the last one should prevail, or in granting letters to one in derogation of the rights of another, the Ordinary may err, but still he acts within his jurisdiction, and his grant is effective until it be revoked. The death of the person whose goods are in contest, is however an essential preliminary to the Ordinary's action. Upon the fact of death, which is necessary to give jurisdiction, the Ordinary must exercise his judgment, and so must all who claim under the Ordinary's assumption of the fact; for the fact not existing, all that depended on it fails.

It has been argued that every inferior Court must necessarily judge of the facts essential to its own jurisdiction, and

Moore vs. Smith.

that its judgment in favor of its jurisdiction is not liable to be elsewhere annulled by disproof of any such fact, the want of which does not appear on the face of its proceedings, although its proceedings might sometimes be restrained by prohibition. Reference has been made to our case of the *State vs. Ben Scott*, 1 Bail., 294. Before extreme conclusions should be drawn from that case, a careful consideration should be bestowed upon the cases of *Mendyke vs. Stint*, 2 Mod. 271, and *Herbert vs. Cook*, Willes, 36, note. But for present purposes it is enough to observe that *Scott's* case related to jurisdiction over the person, and to the effect of pleading to the jurisdiction and submitting to an overruling of the plea. In reference to the Ordinary's power over the goods of this living plaintiff, the want of jurisdiction respected the subject matter, not the person. No plea, nor waiver, nor submission of the plaintiff could have established the fact essential to jurisdiction, or have conferred jurisdiction. If under a citation said to have been *in rem*, all the world was present when the Ordinary made his grant, the existence in life of the plaintiff was destructive of the proceeding; his own assent to it would have been nugatory, and his plea or other act, by which jurisdiction over a person might be sustained, would necessarily have contradicted the fact which was indispensable to any exercise of the Ordinary's authority.

Under a comparison of the several merits of these parties blame and laches have been imputed to the plaintiff for his long-continued neglect of his property and friends, by which others were misled. Of the reasons of the plaintiff's conduct we are not informed. It is enough that he was under no legal obligation to stay where his property was, or to give information concerning himself when he was away. He encountered the risk of the statute of limitations, which, if his absence had been a little longer would have forever barred him. The case must be decided just as if he had been

Columbia, November and December, 1858.

immured in a dungeon, or otherwise, compelled to remain unheard of, during his long abence.

III. The grant of administration having been made without jurisdiction, was entirely void as to all persons and for all purposes. No revocation of it was necessary, and for the plaintiff to have asked a revocation might have been said to imply his acknowledgment of its temporary validity.

This Court is satisfied with the instructions which were given to the jury, and is compelled to overrule all the grounds which have been taken for the defendant's motion.

The motion is dismissed.

O'NEALL, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed

Spires vs. Ordinary.

HERBERT SPIRES AND WIFE vs. A. H. FORT, ORDINARY.

HAMILTON SPIRES AND WIFE vs. SAME.

Ordinary—Jurisdiction—Partition of Lands.

An action will not lie against the Ordinary for the plaintiff's share of the proceeds of land sold for partition under the Acts of 1839 and 1842 (11 Stat. 44, 232), until judicial proceedings have been had before the Ordinary, and the plaintiff's share ascertained.

BEFORE WHITNER, J., AT LEXINGTON, FALL TERM, 1858.

Sum. pros. to recover from the Ordinary the plaintiffs' shares of the proceeds of land sold under the order of the Ordinary. The share of each plaintiff was about eighty-four dollars. The Ordinary had paid to each plaintiff about forty dollars, and he claimed the right to retain the balance and apply it in some way not clearly disclosed by the evidence. His Honor, the presiding Judge, decreed for the plaintiffs.

The defendant appealed and renewed his motion for a nonsuit, on the ground that the defendant was not liable to be sued in this form of action.

Fort, Fair, for appellant.

Bauskett, contra.

The opinion of the Court was delivered by

WARDLAW, J. When the Ordinary, as a mere ministerial officer, has in hands an ascertained sum of money, which, upon proper demand, he refuses to pay to a person entitled to receive it, an action on his bond will lie against him and

Columbia, November and December, 1858.

his sureties: and where such action on the bond would lie, an action of *assumpsit* against him might be maintained. But where the Ordinary has, (under the Acts of 1839 and 1842, concerning the sale of real estate by him, 11 Stat. 44, 232,) in his hands a fund, in reference to which his judgment as a judicial officer is to be exercised, that judgment must be first appealed to, and if thought incorrect, must be corrected by a higher tribunal, before the Ordinary can be made amenable to a law Court for his neglect to pay to any person the share of that fund, which such person may be fairly entitled to receive.

In this case the Ordinary has in hand a fund which arose from the sale of land. Whose the land was, we do not undertake to say: it was sold as of the estate of Michael Wise senior, deceased: it is now said, that it was land of which Aaron David Wise was at his death seized in fee conditional, and that he dying without heirs of his body, there was a reverter to the heirs of Michael Wise, senior, who devised it to Aaron David. Perhaps, in either view, the same persons are entitled to share it, and in the same proportions. These plaintiffs claim balances of certain shares: the Ordinary, not denying that the shares of the female plaintiffs were such as are claimed, if they had been subject to no deductions, insists that they were properly reduced to the sums which he has paid, and that no balances are due. In reference to the deductions which have been made, there have been before the Ordinary various proceedings, in which some blunders and much unmeaning verbiage may be easily seen. Whether costs only, or also the claims of an executor founded upon a deficiency of assets, have been considered; whether the Ordinary has made a decree, or only expressed an advisory opinion, may be doubtful. But it is certain that the Ordinary had jurisdiction to consider both the costs and the executor's claim, and that from his judgment, in reference to either, appeal can be had only to the Court of Equity. Act

Spires vs. Ordinary.

of 1842, § 1, 7. The matter, as involving accounts, has been considered unfit for the examination of a law court, and cannot be brought before it by action against the Ordinary, when it could not have been by appeal from his judgment.

It is asked, then, if the Ordinary shall keep what the plaintiffs are entitled to, because they have not appealed to the Court of Equity in due time. They must abide any consequences which their own neglect may have brought upon them. But no decree has been exhibited to this Court concerning costs, or concerning the fund from which the plaintiffs now claim balances. Let the plaintiffs, after citation of other persons interested in the matter, obtain the decree of the Ordinary concerning this fund. If he should refuse to decree, or if they should be dissatisfied with his decree, they may appeal to the Court of Equity; that Court can judge of the propriety of the course which the Ordinary may take, and of every deduction which he may make,—can enforce his obedience to its order for payment; and can, moreover, guard the rights of the wives, plaintiffs, whose was the inheritance that has been sold, against husbands, who, as said in this Court, have shown themselves to be unworthy of trust.

The motions for nonsuit are granted.

O'NEALL, WITHERS, and GLOVER, JJ., concurred.

Motions granted.

Columbia, November and December, 1858.

THE STATE *vs.* STARLING CLAYTON AND MARTIN CARTER.

*Venire Facias—Grand Jury—Petit Jury—Practice—
Constitutional Law—Negro Stealing—Indictment—
Evidence—Confession.*

A *venire facias* to summon a jury is good, although the sheriff has not endorsed on it the fact of entry in his office.

A grand jury need not consist of more than twelve members.

The 97th rule of Court, prescribing a new mode of impanneling a petit jury, is not unconstitutional.

Two or more may be jointly indicted for negro stealing, and one may be convicted and the others acquitted.

In a joint indictment, one may be charged with inveigling, stealing and carrying away a slave, and another, or others, with hiring, aiding or counselling him to do so.

Confessions of prisoners in custody, *held* admissible.

Irrelevant and immaterial questions to a witness, *held* properly rejected.

One may be guilty of stealing a runaway slave.

BEFORE MUNRO, J., AT BARNWELL, FALL TERM, 1858.

The prisoners were indicted, in one count, for inveigling, stealing and carrying away a negro slave, named Gilbert, the property of Margaret Hays; and, in another count, for aiding Gilbert in running away and departing from the service of his owner.

The report of his Honor, the presiding Judge, is as follows:

“The defendants were jointly indicted, under the Act of 1754, for inveigling, stealing and carrying away a man slave, named Gilbert, the property of Mrs. Margaret Hays.

“The testimony as touching the defendant Carter’s participation in the offence, was as follows: *Charles A. Calhoun* testified that he was the conductor of the night passenger

State vs. Clayton and Carter.

train between Charleston and Augusta, and that on the night of the 1st October last, between the hours of twelve and one, the train reached the Midway station, distant about seventy-two miles from Charleston; while at Midway, Carter entered the cars in company with a negro man; they took seats opposite to each other, in the negro or conductor's car, as it is termed; witness inquired of Carter where he was going: he replied to Charleston; witness then asked him if he paid the fare of the negro; he replied, "I do;" witness then told him the fare of himself and negro was four dollars and thirty-five cents; Carter handed him a twenty-dollar bill, out of which witness took the fare of himself and the negro, and returned to him the change; witness then ordered the train to start, and proceeded slowly for about fifty yards, when Carter was arrested by Bamburg, Hays and Rice. It was at the request of these last-named persons that witness ordered the train to stop; after Carter's arrest, Bamburg remarked to him that it was a bad affair he was concerned in; to which the former replied: "I am as innocent of it as you are;" witness then offered to return to Carter the four dollars and thirty-five cents which he had paid for his own and the negro's fare; he refused to receive it, at the same time denying that he had ever paid witness for the fare of the negro; witness then handed the money to one of the party who had him in custody, and they all left the cars; Bamburg, Hays, Rice and Harvey, took the cars at Bamburg's; the three first mentioned were in the conductor's room when Carter and the negro came on the cars.

"*J. Harvey* has resided at Bamburg for the last twenty months, and knows the prisoner; on Tuesday night, the 1st of October inst., took the cars at Bamburg for Midway, and while at Midway saw Carter enter the cars in company with a slave named Gilbert, belonging to Mrs. Hays; they entered the conductor's car and took seats, the negro facing Carter; witness was in a seat immediately opposite the one occupied

Columbia, November and December, 1858.

by Carter and the negro; no obstruction was between them; witness had on an overcoat which he had pulled up as high as he could, and had pulled his hat as low down as he could in order to conceal himself; Calhoun, the conductor, approached Carter, inquired where he was going, and demanded his fare; Mr. Carter replied, "I am going to Charleston;" conductor then inquired if he also paid the fare of the negro; then Carter replied, "I do;" Carter inquired of conductor the amount of his and the boy's fare; the latter replied that it was four dollars and thirty-five cents; Carter then handed the conductor a bill, the latter handed him back some bills, upon which Carter remarked, "I owe you thirty-five cents," and handed him back some change; the conductor then stepped back and ordered the boy, Charley, to ring the bell for the cars to proceed; about this time Carter rose from his seat and told Gilbert to remain where he was, that he, Carter, had some business in the back part of the cars, but that he would return immediately; as Carter started to go into the back part of the train, witness told Bamburg, who was then in conductor's room, which is in the centre of the car, that Carter had left the car; Bamburg followed him, and the next that witness saw of Carter, after the cars had proceeded for some distance, he was brought into the car in custody of Bamburg, Hays and Rice; Gilbert made an effort to escape, when witness seized him. The conductor offered to return back to Carter the money he had paid for his own and the negro's fare; Carter denied having paid him the negro's fare, and declined receiving it; witness, Bamburg, Hays and Rice, took the cars at Bamburg; witness expected to see Gilbert at Midway, and witness' object in going there was to rescue him from the possession of any one who might have him.

"The substance of the testimony, as bearing upon the defendant Clayton's participation in the affair, is as follows:

"*J. Harvey*, said he knew Clayton, having frequently seen him at Bamburg, and on the night above referred to,

State vs. Clayton and Carter.

and during the time the cars stopped at Midway, witness being seated on the side of the cars next to the depot, at about fifteen minutes past twelve in the night, he saw the defendant, Clayton, standing within about four feet of the cars, and nearly opposite to where he was; there was a fire at the depot, and was also moonlight; Clayton did not enter the cars; on his cross-examination he said he saw a human form standing in the position above described, which, to the best of his knowledge, was Starling Clayton.

"*Hansford D. Stewart* testified, that on Friday night, the 1st of October, between the hours of eight and nine o'clock, himself and J. G. Jones went to Carroll's saw mill, which is about three-fourths of a mile from Midway; they seated themselves under the slide, and after being there some short time, two persons rode up on horseback; shortly after their arrival some one whistled; they walked to within about fifteen paces of where witness and Jones were concealed, when one of them, whose voice witness recognized to be that of Starling Clayton, said, "All I could borrow was one dollar;" the other, whose voice witness could not recognize, responded, "That is a good man;" after remaining at the mill for about a half hour, they rode off in the direction of Midway; the passenger train had not then arrived; after they left, witness and Jones came out from under the slide and walked towards Midway, and while on their way to that place, and after the passenger train had passed, they met two men on horseback, returning from that place; they were going at half speed; and as they passed where witness and Jones were, one of them, whose voice witness did not recognize, said, "Keep on this side of the road." He thought it the voice of Clayton.

"The testimony of J. G. Jones was substantially the same as that of Stewart.

"*Dr. Moses West* next said, that he lives about three hundred yards from Clayton; he went over to Clayton's—inquired for him, and found he was not at home; next day witness

Columbia, November and December, 1858.

saw him at John Berry's; he was then in custody; witness remarked to him, that he was sorry to see him in that situation—to which he replied, 'Ah, Doc., I would not have been in this fix if I had not been persuaded into it; they have been persuading me to get into it for about two years.' To this declaration no exception was taken.

"*Gabriel G. Miller* said, that while Blichinton, a constable, and one Kirkland, were carrying Clayton to Squire McMullan's, witness overtook them on the road; as witness came up, Kirkland asked Clayton to repeat over to witness what he had been telling Blichinton and himself. The answer of Clayton was objected to on the ground that it was not voluntary—the objections were overruled—and the response of Clayton was as follows: 'I have never carried off a negro; Martin Carter carried off the negroes; all I did was to go to the railroad and fetch back the horses; for one of the negroes sold by Carter I received one hundred dollars; and for another I received one hundred and fifty dollars.'

"Upon another occasion, when Clayton was at Berry's, on his way to McMullan's, Clayton asked witness to step aside with him; one John D. Grymes accompanied them a few paces from the crowd; Clayton asked witness if he thought there was anychance for him to turn State's evidence in this case; witness replied he did not think there was—that there was too much evidence against him; if there was not so much evidence against him, there might be a chance. Clayton then said, 'If it had not been for Martin Carter I would not have been in this fix.'

"These declarations by the prisoner were objected to on the same ground as were the former made to this witness, and were also overruled.

"This witness said he was not on friendly terms with Clayton.

"*John D. Grymes*—Overheard the conversation between Miller and Clayton, and thought it substantial as Miller had done.

State vs. Clayton and Carter.

"*Martin Kinard.*—Visited Clayton the first day of his confinement in prison.

"*Clayton* asked witness how he thought it would go with him. Witness replied, he did not know; Clayton then said, 'If I had not been persuaded into it, I would not have been in this fix; for the sake of lucre or money, see what I am now.'

"*R. C. McMullan.*—Witness is the magistrate who committed Clayton; witness accompanied Kinard on the occasion of his visit to the jail to see Clayton; witness cautioned him to make no confession to witness; after his caution, however, Clayton asked witness what he thought it would do with him; witness replied, he thought it would hang him; Clayton then said, 'If I had not been persuaded into it, I would not have been here—it is money (or lucre) that has caused me to be where I am.' These confessions were not objected to.

"*Elijah Carter.*—Incompetency of this witness was objected to by his counsel, on the ground that there was a prosecution pending against him for the same offence; the objection was overruled. This witness said, that he is the father of Martin Carter, and father-in-law of Clayton; that on Friday night, three weeks ago, Clayton came to his house after dark; said he wanted his son Martin to go with him and help catch a runaway negro that had been out eight years; witness's son declined going, on the ground that he was poorly, and had washed his feet to go to bed; Clayton said, if he would go they would catch the negro, and if Martin would carry him and deposit him in the guard-house in Charleston, he, Clayton, would go to Charleston, get the reward, and give Martin one hundred dollars. Eventually Clayton persuaded Martin to go, and they went off together; witness said, before Clayton and his son left the house, one of them looked at the watch, and said it was after ten o'clock.

"*Wm. D. Allen.*—Witness lives in the neighborhood of Clayton and Carter—on Friday evening, the 1st of October,

Columbia, November and December, 1858.

before sun-down, saw them together—they were talking together behind Clayton's corn-house; no one was near them; there was another man standing at some distance from them; the corn-house is near the road, and they might have been seen passing along the road; witness was in that position when he saw them.

"Mr. Bellinger proposed to propound the following questions to Calhoun, the conductor, which are referred to in the fourth ground of appeal. They were objected to by the solicitor, and the objection was sustained:

"1. Whether he had been informed that a negro would be at Midway that night to be caught?

"2. Whether he was not so informed by one of the party who got in at Bamberg, or Graham's?

"3. Whether in approaching Midway, in the cars, he did not expect to find a negro at Midway?

"In reference to the sixth ground, there was not the slightest proof that the slave was a runaway, unless an inference to that effect may have been drawn from the testimony of Elijah Carter. On this point, however, I did say to the jury that it was somewhat surprising that Carter should have been carrying a runaway slave to Charleston during the prevalence of an epidemic, when he could much more conveniently have been lodged in the Barnwell jail; and still more surprising that when arrested in the cars, instead of claiming him as a captured runaway, he should have disclaimed all knowledge of him. But conceding the slave to have been a runaway, I could not well perceive how that could lessen the guilt of the prisoners. The answer to the seventh ground will be found in the 97th rule of Court, and the case of the *State vs. Boatwright*, 10 Rich. 407.

"Both prisoners were convicted."

The prisoners appealed, and now moved this Court for a new trial on the grounds:

State vs. Clayton and Carter.

1. Because the defendants were jointly indicted, and there was no sufficient proof to sustain such indictment; and his Honor erred in charging the jury that either prisoner might be found guilty; whereas, (it is submitted,) his Honor should have charged the jury that, if either prisoner was innocent, or if one of them had only aided in carrying away the slave, a verdict of not guilty ought to be rendered.

2. Because if there was proof of guilt against Clayton, it was only for aiding another in committing an offence charged, and there was no such charge in the indictment, nor was there sufficient proof of such a charge, if it had been made.

3. Because his Honor erred in admitting confessions of the prisoner Clayton.

4. Because his Honor erred in excluding certain questions as asked.

5. Because there was no sufficient proof of the guilt of the prisoners, or either of them.

6. Because his Honor erred in charging the jury that it made no difference whether the negro was a runaway or not; whereas it is submitted that it should have been left to the jury to decide whether the negro was taken under the belief that he was a runaway.

7. Because the jury were impannelled by lot instead of calling the juries numbered one and two, according to the practice existing prior to 1856.

They also moved in arrest of judgment, or for a new trial, or to quash the proceedings, (as may be necessary and proper,) on the grounds:

Columbia, November and December, 1858.

1. Because the writs of *venire* (under which the grand and petty juries were summoned to the Court at which the defendants were tried) were never entered in the sheriff's office, either before or since the trial.

2. Because the indictment on which the defendants were arraigned and tried, was found a "true bill" by a grand jury composed of only twelve persons.

Bellinger and Hutson, for appellants.

Owens, Solicitor, contra.

The opinion of the Court was delivered by

WITHERS, J. Every phase of this case exhibited by the brief or presented by the argument, has received the examination of this Court, and its judgment and the grounds, upon which it rests, are now to be announced.

We advert first to the grounds that are taken in arrest of judgment; and they relate to the *venire* for the grand jury as well as that for the petit jury, and to the number, thirteen, who were sworn of the grand jury that found the bill.

The objection to the *veuires* is, that the sheriff has not endorsed upon them the fact of entry in his office, and it is insisted, that, therefore, they are not legal process and are void.

The sixth section of the sheriff's Act directs the sheriff to keep a "writ book," into which he shall "make an entry,"—"with the date, and endorse on the original the time of such entry in his office," many kinds of process, mentioned in that section by name, among which a *venire facias* does not appear, and could be included under none that are specified unless under the word "summons," or the words "any other mesne process whatever issuing from either of the Courts of Ordinary, Law, or Equity."

State vs. Clayton and Carter.

To regard the omission of the sheriff to comply with what is merely directory, in respect to such entry or endorsement, as rendering the process void, and thus upset all proceedings under it, would be to disregard a clear and well-recognized legal distinction, and work irreparable and wide-spread mischief to the public and to individuals. Though a venire is judicial process, and all such process is required to be authenticated by the seal of the Court, yet it is but a precept to the sheriff to summon into Court the jurors drawn; and having answered that purpose, it has effected its object, and cannot be assailed though not issued or returned within the time prescribed by the legislation of 1839, and though the device of the seal be not legible upon its face—vide *The State vs. McElmurray*, 3 Strob. 33. Surely if this process or precept be beyond the reach of such objections, it may withstand those now urged against it. Even the omission to observe the requirement of the Act of 1799, directing new jury lists every three years, affords the prisoner no ground of objection to the array or of challenge to the polls—vide *State vs. Baldwin & Massey*, 2 Hill, 379. None can doubt that a general distinction between neglect by ministerial officers of statutory regulations that shall be put to the account of mere irregularity not affecting substantial justice, as also a distinction between objections available at the time of trial, sometimes curable then, and for that reason unavailing afterwards, are indispensable to the course of justice as administered by Courts, and to the stability and finality of their judgments.

It is objected, moreover, that the jury which found the bill was not a lawful grand jury because thirteen, of which number it consisted, were not enough. Our investigation of this point leads to the conclusion that twelve would be a sufficient number. Blackstone in 4 Com. 302, speaking of the panel of grand jurors, says, "as many as appear on the panel are sworn upon the grand jury, to the amount of twelve at the

Columbia, November and December, 1858.

least, and not more than twenty-three, that twelve may be a majority, which number, as well as the constitution itself, we find exactly described so early as the laws of King Ethelred. *Exceant seniores duodecim thani*," &c. In 2 Hale, P. C. 151, is this language, "In all criminal causes the most regular and safe way, and most consonant to Magna Charta, 5 Ed. 3, ch. 9, &c., is by presentment or indictment of twelve sworn men." (That great judge was understood to have little favor for prosecutions by information, so often an engine of oppression in tyrannical reigns and our constitution has ratified his sentiments in that respect.) At page 161, he says, "if there be thirteen, or more, of the grand inquest, a presentment by less than twelve ought not to be, but if there be twelve assenting, though some of the rest of their number dissent, it is a good presentment, for if twelve agree it is not necessary for the rest to agree." Says Mr. Chitty, 1 Crim. Law, 306, "the grand jury must consist of twelve at the least." Hawkins concurs with the above authorities—vide Bk. 2 ch. 25, sec. 16. In Com. Dig. "Indictment A." it is said, an indictment is an accusation, "found by a proper jury of twelve men," meaning by "proper," no doubt, men of the proper qualifications, and resident in the county or other prescribed jurisdiction of the Court. But a jury of twelve men is recognised as a complete one. The reason of the rule, very ancient as we have found it to be, requiring twelve jurors, at the least, to concur in sending any man for trial before the petit jury of the sessions, is, by the concurrence of all writers upon the subject, that he shall not suffer in that jurisdiction without the assent of twenty-four jurors, affirming his guilt. Now, this object is secured as well by accepting a grand jury of twelve only, as of any greater number; and if there be no more than twelve, the more likely is the prisoner or accused to escape trial altogether. The idea that more than twelve must be sworn may have been encouraged by the requisition that such number, "at the least," must concur; by the circum-

State vs. Clayton and Carter.

stance, that a greater number than twenty-four, has sometimes been required to be summoned, for with us thirty were at one time to be drawn and served; by the observation of Mr. Chitty, 1 Crim. Law, 312, that "it is not unusual, in practice, after fifteen or sixteen have been called, to consider the inquest as complete, and not to insist upon the service of the rest who may be in attendance;" by the custom of the prosecution in desiring more than twelve to be impannelled to increase the probability of securing an indictment; and lastly, by an inattentive reading of what Coke says at page 30, 3 Inst. as follows: "No peer of the realm or any other subject, shall be convicted by verdict, but the said offences must be found by above four-and-twenty, to wit, by twelve, or above, at his indictment, or by twelve peers, or above, if he be noble; and by twelve, and not above, if he be under the degree of nobility." Instead of "above four-and-twenty" the author manifestly meant, "said offences must be found by four-and-twenty, or above," that is at least four-and-twenty for a commoner, for his petit jury could comprise no more than twelve, but the peer might have a jury for trial far above four-and-twenty, and the effort was to state the rule, in the same sentence, for both classes. From what source soever the conception arose that produced this ground of appeal, there seems to be no solid foundation for it in law, but very satisfactory reason and authority to hold a grand jury of thirteen members a lawful panel to indict. A remark may be here permitted, though not called for by this case, touching the received opinion, that the maximum number is twenty-three grand jurymen. So late as 1837, it was affirmed by eminent English counsel, and it was not disproved on the occasion, that there was no judicial authority for this rule; that nothing could be cited for it but a dictum of Lord Mansfield, to be found in 2 Burr. 1088, which was styled, "rather an anecdote than a judicial decision." But Lord Denman said, (*Rex vs. Marsh*, 6 Adol. & Ellis, 83;

Columbia, November and December, 1858.

Eng. Com. Law. 66,) "the Court has no doubt the limited number is twenty-three. It is a matter of practice proved by authorities in the only way in which proof can be given of a point of that kind which has been undisputed."

To the objection founded upon the surmise, that the late rule of Court (the 97th,) is unconstitutional, because it prescribes a mode of organizing a petit jury when produced to a prisoner for challenge, different from that which had before prevailed, we need only say, we are satisfied with the cases of *Cregier vs. Burton*, 2 Strob. 437, and *State vs. Boatwright*, 10 Rich. 407, and deem it unnecessary to add any thing of argument to what may be found in them.

The first ground of appeal for a new trial alleges, that inasmuch as the prisoners were jointly indicted, and were tried upon the count charging that they did inveigle, steal and carry away the negro, and the evidence showed that one of them only hired, aided, or counselled the other to do the thing charged, the jury should have been instructed to render a general verdict of acquittal, whereas the instruction was, that either of the two might be convicted and the other acquitted, according as the evidence might implicate the one and not the other in the specific charge laid.

We cannot perceive any foundation in reason or authority, or any warrant in practice or principle, to maintain such position. This is not a case in which confederacy or combination is necessary to constitute the crime. One or several may be guilty. So many as the proof may implicate in the offence charged are guilty, and if a dozen were charged and the evidence pointed to one only, why should he not be convicted and the others acquitted, as in assault and battery or murder, as to which last there never has been doubt? For robbery or burglary parties may be indicted jointly or separately, 2 Hale 173, and though they have acted separately, yet if the grievance is the result of the acts of all jointly, all may be indicted jointly for the offence, Arch. Cr. Pl. 59. The argu-

State vs. Clayton and Carter.

ment is, that the statute ordains three distinct offences, to wit: 1. To inveigle, steal and carry away a slave: 2. To hire, aid or counsel another to do it: 3. To aid such slave in running away; that these prisoners were tried and convicted upon the first; that Clayton was shown to be guilty (if of any thing) only of the second offence; and yet that conviction or acquittal upon this indictment could not be pleaded hereafter in bar of a prosecution for the offence of hiring, aiding and counselling. Let this be granted, and still it is obvious that such result does not follow from the fact that the parties are jointly indicted and the proof insufficient to convict both; but it would result from the fact, that the offence, supposed to be subsequently charged, was not that charged and tried upon this occasion; and the very same consequence would follow, whether the prisoners be indicted and tried separately or jointly. If there be validity in this objection, it would seem to go to the indictment itself, and contest the right to indict jointly, at all, under the statute.

It is deemed to be a suitable occasion to observe that since the case of *State vs. McCoy*, 2 Spear, 711, there seems no objection to an indictment under the Act of 1754 of one, as inveigling, stealing and carrying away a slave, and another, or others, as hiring, aiding or counselling that offence; just as in the case of principal and accessory in murder. The words of the Act make it manifest that two or more may bear the same relation to the crime, created by the Act, and to each other, that they may as to capital felonies at common law.

The second ground for a new trial complains that there was not proof sufficient to show Clayton guilty of inveigling, stealing and carrying away the slave; that the evidence as to him, indicated only aiding and abetting Carter, and was inconclusive upon even that form of guilt. This has led us to examine the facts reported, and we find evidence enough, if credible, (and it has been believed by the jury,) to show, that

Columbia, November and December, 1858.

the two prisoners were in concert on the same evening of the asportavit by Carter, in an enterprise pretended to be directed towards some inveterate runaway slave, yet ending in the possession and asportavit by Carter of Gilbert, the slave of Mrs. Hays, who was not runaway, who was in their neighborhood, who must have been well known to them, according to all probability; that Carter's guilt is proved beyond all reasonable question; that Clayton's admissions (those not objected to) show a guilty participation with Carter; that when Carter entered the cars with Gilbert, Clayton was within four feet of them near a fire; that, as one witness believed, he soon after heard Clayton's voice as he proceeded on horseback along the road from the railroad station; that Clayton admitted he rendered the service of carrying the horses back; all which combined does constitute evidence enough to justify the jury, in our deliberate opinion, in placing Carter and Clayton in the same category.

The question raised upon the admission of confessions cannot be better disposed of than by referring to our series of cases, *Crank's*, *Kirby's*, *Vaigneur's* and *Gossett's* which are too conclusive in favor of the ruling on circuit upon this point to warrant any additional observations.

Any answer that Calhoun could have made to the three questions proposed for him and excluded would be liable to the double objection, that they would but disclose hearsay if of any avail at all, and otherwise would have been wholly immaterial. If every one of them had been answered as the counsel desired, in the affirmative, it is not perceived what influence they ought to have had upon the question before the jury.

The case of the *State vs. Miles*, 2 N. & McC. 1, is a full answer to the matter of the 6th ground taken for a new trial. The jury have found Carter guilty of stealing the negro, and the case cited shows that it was quite immaterial whether he thought he was stealing a runaway or not. There does not

State vs. Clayton and Carter.

appear to us, however, any reason to suppose that Carter was in the least mistaken on the subject.

This Court is constrained to dismiss the motions in this case in behalf of the prisoners, and it is ordered accordingly.

O'NEALL, WARDLAW, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motions dismissed.

Columbia, November and December, 1858.

THE BANK OF THE STATE OF SOUTH CAROLINA *vs.* SIMPSON
BOBO.

*Trespass to try Title—Judgment—Evidence—Corporation
Agent—Stockholder—New Trial—Location.*

A judgment in trespass to try title against a corporation of which B. was agent and a stockholder, is not conclusive against B. claiming under a junior grant, to himself, but the record may be given in evidence against him on the question of location.

New trial granted, the verdict being against the evidence upon a question of location.

The Court will more readily grant a new trial upon a question of location than upon most other questions of fact.

BEFORE O'NEALL, J., AT SPARTANBURG, FALL TERM,
1858.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of trespass to try title.

"The plaintiff showed title under a grant to Abraham Markley, for one thousand acres on the ridge between Island Creek and the head waters of Thicketty Creek, in Spartanburg district, dated 3d November, 1788,

"In the progress of the case, it was shown that the plaintiff in 1851, recovered the land now in dispute, in a suit against the South Carolina Manufacturing Company, of which the defendant then was the agent and a large stockholder. The judgment bears date 30th December, 1851.

"The plaintiff contended that this recovery concluded the defendant's defence. I thought otherwise, but allowed the record to be given in evidence in favor of the location.

"The defendant relied on a grant to himself, for nine hundred and eighty-seven acres, 25th June 1851.

"The plaintiff showed a resturvey of the Markley grant, in

State vs. Bobo.

1802: that survey all the Surveyors conceded covered the land in dispute.

"Epton and Gibbes, Surveyors, agreed that the Markley grant was well located, and covered the land in dispute. Harris and Camp, Surveyors, thought otherwise.

"The land, as claimed by the plaintiff, and located by Epton and Gibbes, was the same which had been recovered in 1851, against the South Carolina Manufacturing Company.

"Ezekiel Dobbins, an aged witness, now deceased, who owned an adjoining tract of land, pointed out the Hickory Station as the station of the Markley grant.

"It was abundantly proved that the land in dispute, from the earliest times, had been known and recognized as the Markley land.

"The corner called the Brown corner, was ascertained, as Epton thought, by pointers.

"The land lay, beyond all doubt, on the ridge between Island Creek and the head waters of Thicketty.

"I thought the location was well established, and that the plaintiff ought to have a verdict. The jury thought differently, and found for the defendant."

The plaintiff appealed and now moved this Court for a new trial, on the grounds:

1. Because the recovery in the case of the Plaintiff *vs.* The South Carolina Manufacturing Company, should have been held conclusive against the defendant in this case, he being a member of said Company, and its acting agent.

2. Because the grant under which the plaintiff claims, was located consistently with the best evidences of location, and should have been established.

Dawkins, for appellant.

Columbia, November and December, 1858.

Reed, contra, cited *Bank vs. Bridges*, (ante 87) 1 Strob. 2; *Thomas vs. Jeter*, 1 Hill, 380.

The opinion of the Court was delivered by

O'NEALL, J. 1. On the first ground of appeal, we are constrained to say, that we cannot give greater effect to the recovery in the case of this Plaintiff *vs.* The South Carolina Manufacturing Company, than was given on the circuit. It was admissible to show a former location in a suit at law between the plaintiff, and a party having an interest identical with the defendant. Still it could not be conclusive against the defendant, for he is not the same party, nor a privy in law, on the title then adjudicated. Nor does the decision in the case against Bridges, 11 Rich. 87, help the objection of the defendant to its admissibility in evidence. For there the only questions adjudicated were, that it was not *conclusive*: and that Bridges, who was a mere trespasser under Bobo, was no privy in law.

2. The grant under which the plaintiff claims was, we think, well located. The facts that the land in dispute lay on the ridge between the head-waters of Thicketty Creek, and Island Creek, that in 1802 it had been resurveyed, and that *that plat* was found to cover the *locus in quo*: that it, (the land in dispute) was always known and recognized as the Markley land, under whose grant the plaintiff claims; that in the suit against the South Carolina Manufacturing Company in 1851, the Markley grant was located on the land in dispute; that if the Brown corner, (where were found pointers of the age of the grant, and one line tree) was taken as the corner of the Markley grant, and the consequent location covering the land in dispute: or if taking the survey in 1802, with the Hickory station pointed out by Dobbins, with the concurring opinions of two such surveyors as Gibbs and

State vs. Bobo.

Epton, in favor of the location, certainly constitute unanswerable reasons in favor of the plaintiff's location, and that the plaintiff ought to have had a verdict. It is true the water marks are not precisely those found on the original plat: but these certainly ought not to prevail against such evidences of location as I have stated. Nor do I think the opinion of two very worthy men and good surveyors, Col. Harris and Mr. Camp, against the location, ought to prevail.

That the jury have found against the location is no reason why the verdict should stand. For in *Felder vs. Bonett*, 2 McM. 44-47, and in many other cases, we have held that the Court having the means of reaching the truth with greater certainty in questions of location than in most other questions of fact, will more readily grant motions for new trial.

The motion for a new trial is therefore granted.

WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ,
concurring.

Motion granted.

Columbia, November and December, 1858.

M. L. HARVIN & WIFE, *Adm'x* OF F. WEEKS, *vs.* J. WEEKS,
Adm'x OF R. WEEKS.

Bond—Executory Contract—Fraud on Creditors.

Though an executed contract, as a conveyance of land, cannot be avoided, as between the parties, by showing that it was made with intent to defraud creditors, yet in an action brought to enforce a bond, or other executory contract, the defendant may show that it was made to defraud creditors, and thus defeat plaintiff's recovery.

BEFORE WHITNER, J., AT SUMTER, FALL TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of debt on bond for payment of money.

"The obligee and obligor were related, and had each died after the day the bond was payable. I think years had intervened, but precise dates were not furnished. A mortgage had been executed same day of bond, and to secure its payment.

"Friendly Weeks, the obligee, had said during his last illness, and eight days before his death, to a witness, also a relative, who was examined by commission, that he held the bond and mortgage on Robert Weeks, but that Robert Weeks owed him nothing; that it had been taken to secure his property from his creditors, and that nothing was due.

"In reply, an effort was made to show that there was a valid consideration, and that the declaration of the obligee, if made as reported by the witness, was at a time and under circumstances which showed he was not of sound mind. To these ends the person who prepared the papers, or was present at conversations between the parties, and some of the previous transactions between them were heard and inquired

Harvin vs. Weeks.

into, and also the state and condition of the obligee four days before his death was shown by one of the attending physicians. This testimony is not minutely reported, because not called for by the question raised for the consideration of the Court of Appeals.

"The testimony being all out, and without objection, for reasons that are obvious, the jury were instructed to find according to the facts as ascertained by them; as the point suggested in the argument would be available before another tribunal, if well founded. The jury was instructed that if the evidence satisfied them there was nothing in fact due and owing on the bond, even although it had its inception in a fraud on the part of both obligee and obligor, as the aid of this Court was invoked, the better rule was to leave the parties as found. The verdict was for the defendant."

The plaintiffs appealed, and moved this Court for a new trial, on the ground:

That his Honor erred, it is respectfully submitted, in instructing the jury as matter of law, that the defendant could prove and rely upon the fraud of plaintiffs' and defendant's intestates as a bar to a recovery.

Spain, Richardson, for appellants, cited *Broughton vs. Broughton*, 4 Rich. 491, and cases there cited.

Moses, contra. Bonds and contracts sought to be enforced, stand upon a different footing from conveyances executed. In the former case the fraud may be shown. *Inhabitants of Worcester vs. Eaton*, 11 Mass. 377.

The opinion of the Court was delivered by

GLOVER, J. In the opinion of a majority of the Court,

Columbia, November and December, 1858.

the evidence was properly admitted. The question is, can the obligor of a bond, given for the purpose of defrauding creditors, rely upon the fraud in a suit on the bond brought by one *particeps fraudis*. In the case of *Broughton vs. Broughton*, (4 Rich. 491,) referred to in support of the appellants' motion, it was held that the defendant, who had executed a conveyance of his land to defraud his creditors, could not show the fraud of the grantee and himself in an action of trespass to try the title brought against him by the grantee or his heirs. The same point had before been made in *Sumner vs. Murphy*, (2 Hill, 488,) and O'Neill, J., delivering the judgment of the Court, observes: "the defendant, by a stern but a proper policy of the law, is excluded from the proof which would show the fraud. He is, in this respect, the actor; his fraud silences and estops him from averring against the deed." The general principle is well settled both by English and American cases, and they proceed upon the ground that a party to a deed impeachable for fraud or illegality shall not be heard, to aver the existence of his fraud, and thereby prevent the operation of the doctrine of estoppel. The rule, however, that a deed is conclusive by way of estoppel, was qualified by the Court in the case of *Collins vs. Blantern*, (2 Wil. 344.) The action was debt on a joint and several bond executed by the defendants to the plaintiff, to indemnify him in respect to a note given to stifle a prosecution; and one of the points discussed was, whether, supposing the bond to be void, the facts disclosed in the plea to show that it was so could be averred and specially pleaded. It was held that the bond was void *ab initio*, and never had any legal entity, and that the maxim that the law will not endure a fact in *pais*, de hors a specialty, to be averred against it, did not apply. This decision has ever since been followed, and it is now well established that fraud or illegality is a good defence to a contract under seal.

In the application of the general rule recognized in

Harvin vs. Weeks.

Broughton vs. Broughton, and of that adopted in *Collins vs. Blantern*, a distinction will be found between executed and executory contracts, between conveyances of land or other property and bonds or covenants, where the aid of the Court is asked to enforce the payment of the one or the performance of the other. In executed contracts, the maxim applies, *quod fieri non debet, factum valet*; whereas, in those which are executory, the rule of law is, *ex dolo malo non orritur actio*; and this distinction is well sustained by numerous cases both in England and in this country. In *Phillpotts vs. Phillpotts*, (70 Eng. C. L. R. 85,) four several annuities, chargeable on certain lands, were granted for the fraudulent purpose of conferring a vote contrary to certain English statutes; and it was held, that as between the parties, the conveyance was effectual, but that it was void to the extent of conferring a right to vote. This case is fully sustained by *Doe d. Roberts vs. Roberts*, (2 B. & Ald. 367,) where an estate was conveyed from one brother to another for the purpose of giving a colorable qualification to kill game, and, as against the parties to the deed, it was held valid; but no right to kill game was conferred. In *Bessey vs. Windham*, (6 Adol. & Ellis N. S. 166,) the jury found the deed conveying the defendant's property fraudulent, and the Court agreed to the position taken by counsel that though it might be void against creditors, it operated to pass the goods as against the party himself and strangers, and the case of *Doe dem. Roberts vs. Roberts*, was the authority relied upon. In a suit for the breach of covenant in a composition deed, whereby defendant and others had covenanted to indemnify the plaintiff from loss respecting certain acceptances, and the defence was, that before executing the indenture, the parties had agreed that the defendants should receive from the plaintiff more than his other creditors; the defence was sustained on the ground that such a secret bargain is a fraud on the other creditors, and void when it was made; and Parke, B., observes, "being

Columbia, November and December, 1868.

executory, it cannot be enforced even against a fraudulent party." (*Higgins vs. Pitt*, 4 Wels., Hurl. & Gordon, 312.) The case of *Montefiori vs. Montefiori*, (1 W. Bl. 364,) was not decided on the principle which is applicable to the cases cited above. The note given by the defendant was for the purpose of defrauding the intended wife of the plaintiff, who was not *particeps criminis*, but an innocent person, and the language employed by Lord Mansfield, "that no man shall set up his own iniquity as a defence any more than as a cause of action," applies to a defence set up against the wife, and not against the husband. Walworth, C., referring to this case, says it was decided on a different principle, and that the Court very properly held that it would be a fraud upon the wife of the plaintiff to permit the defendant to repudiate the note. (*Nellis vs. Clarke*, 4 Hill N. Y. R., 424.) That Lord Mansfield, when he said "no man shall set up his own iniquity as a defence," etc., intended to apply the remark to a defence against an innocent party, is manifest from the language which he uses in *Holman vs. Johnson*, (Cowp. 343:) "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.

"If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says, he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and

Harvin vs. Weeks.

defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for, where both are equally in fault, *potior est conditio defendentis*." One of the earliest cases is *Hawes vs. Leader*, (Cro. Jac. 270.) The defendant's intestate granted to the plaintiff all his goods mentioned in a schedule annexed to the deed, and gave him possession by a platter, covenanting that they should remain in his house, and on demand to be carried away by the plaintiff; and to perform this covenant bound himself in forty pounds to the plaintiff. After the death of the intestate, the plaintiff demanded the goods of the administrator, who refused to deliver them, wherefore the plaintiff brought an action of debt in the detinet for the conversion of the goods, and in his declaration showed in specie what goods were in the schedule. (Vide Yelverton, 196, where the case is reported as *Hawes vs. Loader*.) It was adjudged for the plaintiff on several grounds, arising on demurrer to the pleadings, and among others on the following: That fraudulent gifts are only void against purchasers and creditors, but not against the parties themselves or their representatives. The action was on an executed contract to recover the goods which were set out in specie, and the plaintiff did not ask the aid of the Court to execute that which the intestate had promised to perform. Like the plaintiff in *Broughton vs. Broughton*, he relied upon his deed, which conveyed the property. The American cases make the same distinction between executed and executory contracts, in the application of the rule. (*Jackson vs. Garnsey*, 16 John. 189; *Richart vs. Castator*, 5 Binn. 109; *Clapp vs. Firrel*, 20 Pick. 247; *Osborn vs. Moss*, 7 John. 161; *Inhab. Worcester vs. Eaton*, 11 Mass. 375.) Mellen, C. J., in *Smith vs. Hubbs*, (1 Fairf. 71,) speaking of contracts, fraudulent or illegal, says: "There is a marked and settled distinction between executory and executed contracts of a fraudulent or illegal character. Whatever the

Columbia, November and December, 1858.

parties to an action have executed for fraudulent or illegal purposes, the law refuses to lend its aid to enable either party to disturb. Whatever the parties have fraudulently or illegally contracted to execute, the law refuses to compel the contractor to execute or pay damages for not executing; but in both cases leaves the parties where it finds them." So, too, in *Norris vs. Norris*, (9 Dana, 317,) the same distinction is taken: "When the parties to an illegal or fraudulent contract are in *pari delicto*, neither a court of equity nor a court of law will aid either of them in enforcing the execution of that which may be executory, or in revoking or rescinding that which may be executed. In such case the law will not be the instrument of its own subversion, and to every invocation of its assistance replies, in *pari delicto potior est conditio defendentis*." Walworth, C., in the case of *Nellis vs. Clarke*, (4 Hill N. Y. R. 424,) approving the doctrine laid down in these cases, adds: "And the decisions referred to show most clearly that it makes no difference in the case of a suit upon an executory contract, whether the proof to establish the fraudulent or illegal nature of the transaction comes out from the examination of the plaintiff's witnesses, or is introduced by the defendant, who was himself a party to the fraud."

The declarations of the obligee in the principal case show that the bond was executed to secure the obligor's property from his creditors, and that it was, therefore, fraudulent, and the Court is asked to lend its aid to enforce such a contract. To every such application, the answer should be in the language of Wilmot, C. J.: "You shall not stipulate for iniquity; no polluted hand shall touch the pure fountain of justice." (*Collins vs. Blantern*.) If, by enforcing the payment of this bond, the guilty party could be punished, the forms of law might be properly invoked, but these parties are in *pari delicto*, and to aid the obligor in recovering his debt would be to offer a premium to those who assist others

Harvin vs. Weeks.

in executing their fraudulent purposes. The assistance of the Court will be withheld where a party seeks to rescind, or to have declared void, an illegal or fraudulent conveyance of property, in cases *par delictum*, leaving the rogue in the tangled web which he has assisted to weave to catch others. *Broughton vs. Broughton*. Nor will one who has paid money on a fraudulent agreement be helped to bring it back, because in *pari delicto potior est conditio possidentis*. (*Bostic vs. McCanen*, 2 Brev. 275.) And where the obligee of a penal bond, to secure the payment of money founded upon a fraudulent consideration, asks the aid of the Court to secure the fruits of his contract, it will also be withheld; if the attempt be to stifle a prosecution, his purpose is to cheat the State; if to protect his property, to cheat his creditor. We approve the case of *Broughton vs. Broughton*, and recognize the distinction taken by the cases referred to between that case and others, where the contract is incomplete, and the Court is asked to aid in consummating it. A majority of the Court is of opinion that the appeal should be dismissed.

O'NEALL and WHITNER, JJ., concurred.

WITHERS, J., dissenting. I am acquainted with the familiar maxims, *ex dolo malo*, or *ex turpi causa, non oritur actio*, and in *pari delicto potior est conditio defendentis*. It may be doubted, nevertheless, whether these maxims will serve to settle this case. Ch. Kent, 2 Com. 467, states the law thus: "The courts of justice will allow the objection that the consideration of the contract was immoral or illegal, to be made even by the guilty party to the contract; for the allowance is not for the sake of the party who raises the objection, but is grounded on general principles of policy." He cites first the favorite authority of Lord Mansfield, in *Holman vs. Johnson*, Cowp. 343. That case was a sale of

Columbia, November and December, 1858.

tea, at Dunkirk, by the plaintiff to the defendant, knowing the same was to be smuggled into England. The doctrine referred to was laid down, but the plaintiff, nevertheless, recovered. He cites further, *Josephs vs. Pebeer*, 10 Eng. Com. Law, 209; *Langton vs. Hughes*, 1 Maule & Sel. 593, and *Griswald vs. Waddington*, 16 John. Rep. 486; in all which cases, I believe, the fact of illegality appeared by the plaintiff's own showing. In the case from 16 John., the contract sought to be enforced was one between alien enemies, originating while flagrant war was pending between the United States and Great Britain. What said the Court in that case? "It would be difficult to state any principle of law more plainly founded in common sense and true policy, than that which declares that a plaintiff must not appear, *from his own showing*, to have infringed the law of the land, and *if he does*, he cannot avail himself, etc. The plaintiff must recover upon his own merits; and if he has none, *or if he discloses a case founded upon illegal dealing*, etc., he ought not to be heard, whatever the demerits of the defendant may be." The only other case cited by Ch. Kent is, *Mackey vs. Brownfield*, 13 Sergt. & R. 239, which involved no matter of illegality or immorality, for it was only a question of evidence; and the *extent* of the consideration of a perfectly valid mortgage was inquired into to show that less than it purported to secure had been, in fact, advanced; that is, the failure of consideration, or a fraud by one party on another, was held to be matter of defence even against a specialty, which Duncan, J., said they allowed at law, because they had no separate court of chancery. Now, is there not this distinction, that where a plaintiff can make a *prima facie* case of right to recover what he sues for, free from the taint of illegality or fraud, the defendant shall not be heard to allege his own fraud or the mutual fraud of the parties, as matter of defence? How was *Broughton vs. Broughton*, 4 Rich. 491, maintained, if not on that ground? Or the case of *Doe d. Roberts vs.*

Harvin vs. Weeks.

Roberts, 2 Barn. & Alder. 367, which was potent in ruling *Broughton* vs. *Broughton*? I fear it is a distinction too refined, to put those cases upon a ground surmised, to wit, the difference existing between contracts executed and those executory. In the case of *Broughton*, the party through whom the plaintiff claimed was in *pari delicto* with the defendant, and though in theory the paper called a conveyance vested the fee in the plaintiffs, yet it would have for ever proved a barren deed, if the maxim had been applied to the plaintiff that those in *pari delicto* could neither of them attract the attention of the Court; that it was deaf to their entreaties, and should leave them *statu quo*. On the contrary, the Court, in that instance, was very active in behalf of the plaintiff, for the reason that it detected no taint about his case, as he made it *prima facie*; and would not hear the defendant prove that the whole transaction arose in a fraud upon creditors. Strong to the same purport was the case from 2 Barn. & Ald. Said Best, "there is only one case, that of fraud," (we may add from our jurisprudence, also, failure of consideration,) "where a deed can be avoided by parol testimony, but that cannot be done where both the parties are implicated in the fraud;" and both, in that case, were implicated in an indictable conspiracy. He proceeds: "The most favorable way in which this case can be put for the defendant would be to say, that this was a voluntary conveyance; but even then it would be good." To show that this distinction, founded upon executed and executory contracts, may not be sound, vide the case of *Montefiori* vs. *Montefiori*, 1 Wm. Blac. 363. A note by Joseph in favor of his brother, Moses, for a large sum, founded on a pretence that Moses had a large sum of money in the other's hands, the purpose being to mislead a lady with whom Moses was in treaty for marriage, and whom he did marry, was held to be valid; and Lord Mansfield said: "Where, upon proposals of marriage, third persons represent any thing material in a

Columbia, November and December, 1858.

light different from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing in the manner in which they represented it. It *shall* be as represented to be: For no man shall set up his iniquity as a defence, any more than as a cause of action."

There should be, however, a sensible distinction observed between contracts, whether executed or executory, or partially executed; those under seal, at any rate, made (as the one before us was) with *intent to defraud creditors*, and those which drive the parties into direct conflict with the *mala prohibita*; such as contracts upon a gaming consideration, for stifling a prosecution, and the like. These are unlawful in their inception, void *ab initio*, and liable to be so treated every where and by every body, in the hands of a third person, as cause of action or as discount. It is the right of plaintiff or defendant so to treat them—the right of society, not of a particular class. The proposition I would advance is this, that when the object is merely to defraud creditors, or a third person, it shall not be considered that a *deed* (I need not now go beyond that) made in pursuance of it, *as between the parties to it, is fraudulent at all*. There shall be no knight-errantry, on the part of the Court, to hunt up a case for voluntary protection where none is called for or needed. As said by Lord Mansfield, it shall be as the parties have it, where no other person intervenes; they shall be held to their own terms. It is enough for the Court to lend a liberal ear to any body's complaint, and to vindicate the general law and the integrity of society when they are assailed; to explode a fraud upon a party when he asks that to be done. This will very well agree with *Broughton vs. Broughton*, and all our cases maintaining voluntary deeds, gifts by parol and so forth, which a donor or his representative shall not dispute upon grounds fit to be occupied by other persons only; and innumerable have been the actions, in trover and other forms, to enforce such transactions. Nor do such actions

Harvin vs. Weeks.

seem to have been at all regardful of the difference between executed and executory contracts. So also will agree the rule maintaining transfers or liens, which may operate an "undue preference" by an insolvent debtor, for which he may be punished, but without avoiding the transaction between the parties. Upon this ground we can escape the deluding influence of those agreeable maxims with which I set out, and the trouble to which they give rise when pushed to extremity. We may escape another incongruity, to wit, that we shall not explode a contract, repudiate the parties to it, leaving them wholly helpless, treating them, as it were, as *hostes humani generis*, upon the sole ground that a fraud upon certain persons was meditated, *merely intended*, which may never have been, in fact, perpetrated, which the victim in view makes no complaint about, and which he is fully competent to counteract whenever it may so please him. There is much encouragement for this position, as well as others herein taken, in *Hawes vs. Leader*, Cro. Jac. 270; *Sherk vs. Endross*, 3 Watts. & Serg. 255; *Nicholls vs. Patten and others*, 13 Maine. We shall thus give proper scope to the more amiable phase of the doctrine of estoppel, to the maxim often commended and adopted, (*exempli gratia*, *Kidd vs. Mitchell*, 1 N. & McC. 384,) that a party who conveys property to defraud his creditors is estopped to deny his right to convey. Again, it appears to me that we are also encouraged to maintain the ground I occupy by the equity doctrine set forth by Ch. Kent, thus: "*A particeps criminis* has been held to be entitled, in equity, on his own application, to relief against his own contract, when the contract was illegal, or against the policy of the law, and relief became necessary to prevent injury to others."

If the verdict in this case had been made to rest upon the belief of the jury that the bond had been paid, arising from the declaration by the obligee that nothing was due, it would then be one of the many cases in which this Court dismisses

Columbia, November and December, 1858.

the appeal because there was nothing but a question on evidence. But not concurring in the legal doctrines which have been made to control the cause, I should favor a new trial.

WARDLAW, J. I agree that a bond, intended to defraud creditors, is not void between the parties, but in absence of complaint by any creditor, may be enforced. The declarations of intestate, when taken together, amount to no more than an acknowledgment of the purpose for which the bond was made.

MUNRO, J., absent at the argument.

Appeal dismissed.

Belk vs. Massey.

JOHN W. BELK AND WIFE vs. JOHN MASSEY.

Recording—Notice—Possession—Fraud—New Trial.

Where a deed of land is recorded after the time prescribed by law, notice will be presumed from the time it is recorded.

Possession after an absolute conveyance of land is a badge, but not conclusive evidence, of fraud.

The facts reviewed and the verdict held not to be so clearly against the evidence, that the Court would be justified in setting it aside and ordering a new trial.

BEFORE WARDLAW, J., AT LANCASTER, FALL TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

“Trespass to try title.

“The tract in dispute contains eight hundred acres or more, and is separated by Bird's branch from a larger tract which, as it was said, the defendant at some time heretofore, under the sheriff's conveyance to him hereafter mentioned, recovered against some occupant who held under Elijah Phillips hereafter mentioned.

“The plaintiff produced, 1st, a conveyance of the tract in dispute, from Leonard Cagle to Elijah Phillips, dated February 18, 1817; and recorded April 16, 1817.

“2. A conveyance without reservation or exception, from Elijah Phillips, to his daughter Wilmuth, (now a plaintiff,) of the same land, and for the same consideration, six hundred and fifty dollars, which is expressed in the former deed, dated October 4, 1824 and recorded April 25, 1825.

“3. Evidence that Elijah Phillips lived on this tract from 1817, until his death in 1852; that his widow, Sarah, sister

Columbia, November and December, 1858.

of the defendant, continued to live on it till her death in 1853 or 1854; that Wilmuth was about sixteen years old in 1824, and intermarried with the plaintiff, John W. Belk, in 1827; that there was a verbal agreement between the plaintiff on one part, and Elijah Phillips and his wife Sarah on the other, that E. Phillips and wife and the survivor of them, should occupy the land in dispute undisturbed during life or pleasure; that soon after the death of Sarah, widow of E. Phillips, the plaintiff, J. W. Belk, put a tenant on the tract, who was ejected by the defendant, under some proceedings had before a magistrate, and then this suit was commenced; and that the rent of the land was worth two hundred dollars a year.

"The defendant produced, 1st, two records, *N. R. Eaves vs. E. Phillips*, and *John Williams vs. E. Phillips*, showing judgments and *fi. fas.*, in April and June 1844—levy September, 1844, on the land 'whereon the defendant (E. Phillips,) lives adjoining J. McManus and others; sale January, 1845, by Sheriff Hancock; land bid off by Alfred Knight, (son-in-law of E. Phillips,) for three hundred and twenty-five dollars: assignment in writing of the bid by Alfred Knight to Col. Huey; payment to the Sheriff by Huey of two hundred and sixty-three dollars; and receipt given March, 1845, by Sarah Phillips, (then the wife of E. Phillips, acting as a sole trader,) to Huey 'in full of the balance of his bid on my land sold by the Sheriff, sales day in January last, being the amount over the judgments for which the land was sold:—assignment in writing, March 4, 1850, by Huey to the defendant John Massey, 'of the bid assigned by Alfred Knight.'

"2. A Sheriff's conveyance, by James Adams, a successor of Hancock's (ill drawn, with erasures and interlineations, which, although unexplained on the face of the deed, the witnesses knew existed there at the time of its execution,)

Belk vs. Massey.

'for three hundred acres whereon Elijah Phillips then lived,' (with some further description not contained in the levy,) to John Massey, the defendant, dated June 27, 1850.

"3. A deed of conveyance dated January 10, 1842, from Elijah Phillips to Noah Phillips, his son, for two hundred acres, part of the tract in question, called the Cagle land.

"4. A deed of conveyance from Noah Phillips to the defendant, Massey, of the land conveyed to Noah as above, dated January 3, 1846.

"5. The record of a case, *Ben Blakeney vs. Elijah Phillips*—slander:—writ lodged September 27, 1824, served October 1, 1824: Judgment by confession for one hundred dollars, April 19, 1825; *feri facias*, April 21, 1825, renewed and lodged again February 14, 1837; various payments amounting to seventy dollars entered on the *feri facias*, but no satisfaction entered, although many junior executions against E. Phillips have been satisfied by the Sheriff, and some of them by sale, as appears above.

"6. Thirteen other writs of *feri facias* against E. Phillips; the oldest lodged in 1832, and founded on an indebtedness of 1828, yet standing open and unsatisfied. The dates of the lodgment of the others running from 1837 to 1847, and all, or all except some of the oldest, being marked 'satisfied.'

"7. Evidence, that Wilmuth, daughter of E. Phillips, never had any property before her marriage, not reckoning this land. That Aaron Philips and Noah Phillips, sons of Elijah Phillips, and Baker and Threat, his sons-in-law, and Rush, his grandson, all lived upon different parts of the tract in question for periods of eight, ten and twelve years; but none of them had a color of title, except Noah, as above

Columbia, November and December, 1858.

from 1842 to 1846; and except Rush, to whom in 1842 or 1843, Elijah Phillips conveyed all his land, three negroes and everything valuable that he had, saying when he executed the deed that he had been much bothered, was looking for more suits against him, and intended to put his property out of the way. (This deed to Rush was not produced—no actual delivery of it was shown, and no claim under it appeared to have been ever asserted.)

"8. Further evidence that at the death of his father-in-law, old John Massey, E. Phillips was understood to be much in debt, (date unknown,) and son-in-law acquired of his father-in-law lands, the larger tract over Bird's Branch, which his wife called hers; that E. Phillips made a will, whereby he directed a division of his property amongst all of his children, except Mrs. Belk, to whom he gave five dollars:—the defendant said, because he had fallen out with Belk, for buying some of his land at sheriff's sale, and holding on to all the profits of a sale which he made of it to one Cook. The plaintiffs said, because he had given to Wilmuth more than her share in the gift of the land now in dispute.

"9. Returns to tax collectors, showing that the plaintiff Belk paid taxes only for the land he lived on, (six miles from the tract in dispute,) from the year 1845 to 1857, and that Sarah Phillips, wife and widow of Elijah Phillips, paid for one thousand three hundred and twenty-seven acres for most of these years prior to her death.

"IN REPLY.—The plaintiffs showed that Elijah Phillips had two negroes in 1817, and as many or more always afterward until his death; also horses, cattle, &c. That he was a substantial farmer, and at his death left personal estate which sold for more than twelve hundred dollars, and debts to the amount of only eighty dollars.

Belk vs. Massey.

"I submitted to the jury all the questions of fact which were raised, and especially those which related to the fraud imputed by the defendant to the plaintiffs' title. I called attention to the possession remaining in the grantor, and held that if the effect of this was not rebutted by notice to the defendant, he stood in the shoes of the creditors, who had given credit on the faith of this possession, and under whose liens the title to him was acquired, and so, either as creditor or purchaser, he might complain of a voluntary conveyance unaccompanied by a transfer of possession.

"The jury found for the plaintiffs the land in question and one hundred dollars damages."

The defendant appealed on the grounds,

1. Because the deed from Elijah Phillips to Wilmuth Phillips was fraudulent, and could confer no right on the plaintiffs.

2. Because the defendant John Massey, was an innocent purchaser for valuable consideration, without notice of any former conveyance, and should have been protected.

3. Because the verdict of the jury was against the charge of the Judge and the law, and without evidence to support it.

Dawkins, Wylie, for appellant.

Moore, contra.

The opinion of the Court was delivered by

WHITNER, J. The second ground of appeal may be briefly disposed of, as it is manifestly concluded by the cases of *Steele vs. Mansell*, 6 Rich. 435, and *Leger vs. Doyle*, 11 Rich. 109.

Columbia, November and December, 1858.

The deed set up by plaintiffs, cannot be postponed to the sheriff's conveyance to defendant, because not registered within the prescribed time. The registration was nevertheless anterior to the sale by the sheriff, and, under the authority of those cases, operated as a notice to subsequent purchasers.

The remaining grounds impute no error to the Circuit Judge in matter of law, and we are left only to inquire whether the verdict of the jury was "without evidence to support it."

The allegation in the first ground is that the deed under which the plaintiffs derived title, was fraudulent, and could therefore confer no right. The verdict being otherwise, it is not enough to justify an order to set it aside, that doubt may be entertained on the merits. The appellant now undertakes to show that it was against or without evidence. It is insisted that the long possession which followed the execution of the deed, was of itself *conclusive* evidence of fraud, but such a position is not sustained by our cases. It is recognized as a badge of fraud, and affords therefore *prima facie* evidence, but is not conclusive. Amongst many other cases reference may be made to *Terry vs. Belcher*, 1 Bail. 572, in which JOHNSON, J., enters very fully into the consideration of this question, and reviews the authorities of Ch. Kent, and some of the English and American cases. We are to regard, in the case before us, the relation in which the parties stood to each, and especially likewise the fact of cotemporaneous notice to the world, by the registration, of a change of title in fact, rebutting the presumptions that possession might otherwise justify. Another view pressed upon this Court, is the significant fact that plaintiff's deed bears date only *three* days after the service of a writ in slander, and was not recorded until *six* days after a judgment was confessed thereupon.

The plaintiffs were held, and justly, on the circuit to encounter such an assault as either creditors or a purchaser

Belk vs. Massey.

should be entitled to make. If the sale under which the defendant claims could be satisfactorily referred to this judgment, or if it could be seen that the suspected deed in any way effected a disappointment to the plaintiff in that suit, the objection to the verdict would be well founded. But the jury doubtless reached the conclusion, as the circumstances warranted them in doing, that the judgment was in fact satisfied before the sale by the sheriff.

The deed in question was good in any view as between the parties. No creditor or suitor has in any way been disappointed or hindered by this conveyance, unless some one who chose to credit upon the faith of property which he was duly notified had been regularly transferred.

It would be hazardous in a Court to convert even a strong suspicion into an established fact, and thereby override the verdict of a jury.

The motion for a new trial is dismissed.

O'NEALL, WARDLAW, WITHERS, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, November and December, 1858.

AARON CLARK and WIFE and OTHERS *vs.* JAMES WAY and
JOSEPH WAY.

*Easement—Right to use Timber—Trespass Quare Clausum
Fregit.*

A grant of "the use of the timber" on the grantor's land, confers only an incorporeal right to use the timber ; it is no conveyance of the title to the timber itself or the soil on which it grows.

Trespass *quare clausum fregit* will not lie for injury done to an incorporeal right.

BEFORE WHITNER J., AT EDGEFIELD, SPRING TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of trespass *quare clausum fregit*, brought to recover damages for cutting and hauling away timber trees from a certain parcel of land situate in Edgefield.

"John Burgess was seized of a tract of land consisting of two thousand three hundred and sixty-four acres, and by deed executed 12th September, 1840, conveyed one-half the tract to Wiley Glover, absolutely, and in reference to the other half, provided as follows: 'and it is agreed between the said parties, that the said Wiley Glover is to have the use of the timber on the other half of the said tract of land, reserving to myself the use of the said timber for my domestic use on said tract of land with the privilege of sawing it at the mill.'

"John Burgess subsequently conveyed the remaining half to different persons, the title to which, without reservation of timber, had passed to these defendants, and to three hundred and twenty-three acres of it by deed through Mrs. Glover, now Mrs. Clark, one of the plaintiffs. In reference to the alleged trespass, it appeared that defendant had a mill, and

Clark vs. Way.

had cut and hauled a good deal of timber from the tract, but the witnesses were unable to locate either the three hundred and twenty-three acres tract, or the trespasses, with any great precision. In fact, it is not remembered that any evidence was furnished of the location of this last tract, though it was evidently parcel of that half of the tract out of which the dispute arises.

"A motion for nonsuit was refused on Circuit, it being deemed advisable to take the opinion of the jury as to the fact of any trespass, and the amount to which plaintiffs would be entitled. The jury returned a verdict for a very considerable sum."

The defendants appealed, and now renewed their motion for a nonsuit upon the grounds :

1. The deed of conveyance from John B. Burgess to Wiley Glover, of 12th September, 1840, under which alone the plaintiffs claim, transferred no interest or estate whatever in the tract of land described in the declaration, or in the timber or trees thereupon.

2. If the deed referred to transferred any interest at all to Wiley Glover in the land described in the declaration, or in the timber or trees thereon, such interest amounted to no more than a mere easement in respect of the same, or at the uttermost to a life estate in the same, which terminated at his decease.

3. The timber and trees upon the land referred to, if effectually transferred by the deed of 12th September, 1840, were divided in property from the freehold, and thereupon became constructively severed from the soil, and in legal contemplation, *chattels* to all intents and purposes, for an injury respecting which the personal representative of Wiley Glover, was alone competent to maintain an action at law.

Columbia, November and December, 1858.

4. The defendant, James Way, held three hundred and twenty-three acres, parcel of the land described in the declaration, under the deed duly executed of the plaintiff, Elizabeth Clark, without any reservation of the timber or trees thereon, and there was not a tittle of proof that the timber or trees, or any part thereof, cut down and appropriated by the defendants, belonged to the residue of the land not included in the deed last mentioned.

Carroll, for appellants.

Moragne, contra.

The opinion of the Court was delivered by

WARDLAW, J. To the report accompanied by the deed of conveyance from John Burgess to Wiley Glover, it is necessary for a full understanding of the case, only to add, that, under the partition which was made of Wiley Glover's lands, the half tract conveyed to him by Burgess, has passed from the plaintiffs, his heirs at law.

The plaintiffs here contend that by Burgess' deed an interest in the soil of the other half tract was conveyed to Wiley Glover, which interest, yet undivided, has descended to the plaintiffs, and is of such substantial nature, as will sustain this action of trespass *quare clausum fregit*, against the defendants, the owners of this other half tract, for cutting timber trees thereon.

If the cutting of defendants was confined to the parcel of three hundred and twenty-three acres, which Mrs. Clark conveyed, all her interest therein has ceased, she and her husband should not have been amongst the plaintiffs, and for the misjoinder of them, a nonsuit should be ordered. But on this head the evidence was too doubtful for us to venture, after a verdict in favor of the plaintiffs to dismiss the action upon any deduction of fact which we might make.

Clark vs. Way.

What interest in the second half tract did the deed convey to Glover? Neither the covenant concerning the timber nor any other part of the deed shows words or circumstances, which indicate the intention of the parties, that all the timber was immediately, or within any reasonable term, to be severed from the soil. On the contrary, the word *use*, with its context, implies, not destruction, but such enjoyment as will leave a remainder; and the reservation shows that so long as the domestic use of the grantor (if not of the half tract kept by him) should require, timber was contemplated as remaining. There would then be no propriety in applying to this case the doctrine that timber trees sold should be regarded as severed, and so shall pass to the executor.^(a)

An interest connected with the land on which the timber was growing, was, we conceive, embraced in the covenant. But of what kind? Was it corporeal—the trees themselves with soil sufficient for nutriment? or was it incorporeal, the right to cut and remove timber, with the necessary incidents of ingress, and regress? There are no words transferring the title of the timber, but the terms employed are well adapted to show that a right to use timber growing on another's land was intended to be conferred.

Such a right *in alieno solo*^(b) like, common of turbary, or the right to take coal or ore from another's land, is when assignable not properly an easement but a profit *a profit*^(c) which may be acquired by grant or prescription; and a covenant by the owner of the soil that it shall exist, amounts to a grant of it. If the right be not assignable, but a mere personal privilege, the covenant gives an irrevocable license for its exercise.

The plaintiffs have contended that the reservation for the domestic use of Burgess, was void. This reservation (more

(a) See cases collected in note, Green Ev. § 271, 2d edition.

(b) Co. Litt. 4.

(c) Hob. 131; 5 Ad. & El. 413, 758.

Columbia, November and December, 1858.

properly called an exception) is more precise than the right conferred upon Glover; but without any exception the grant containing no words of exclusion, would not have prevented the owner of the soil from exercising thereon the same privilege which he had granted to another.^(a) The exception serves to give some definiteness to the grant, by raising the implication that the grantee's right was intended to extend to all of the timber, except what the domestic use of the grantor should require. Without the exception, Glover could not have complained that others were permitted to use, if he was not obstructed, while the timber lasted. With the exception, Glover could not say "this tree is mine and that is yours." It is not of cutting merely by the owner of the soil that he could have complained, but of cutting which was not within the exception, and which led to a diminution of his profit.

The conclusion which we have attained must result in the nonsuit of the plaintiffs, for the invasion of an incorporeal right cannot be redressed by an action of trespass *quare clausum fregit*.

Was the interest granted to Glover a transmissible one? If so, was it a right *in gross*? or was it appurtenant to the land conveyed to him, or to the mill said to be on that land? Was it devisable?

These questions we have not decided; and we mention them lest it might be inferred from the observations that have been made on the point which has been found sufficient, that an opinion as to either of them is involved in our decision.

The motion for nonsuit is granted.

O'NEALL, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Nonsuit granted. ✓

(a) Co. Lit. 165; Leon. 147; 4 East. 469.

Wardlaw, Walker and Burnsides vs. Harrison.

WARDLAW, WALKER and BURNSIDES vs. JOHN HARRISON.

Guaranty—Notice of Acceptance.

Defendants wrote to plaintiffs as follows: "We take pleasure in commending Mr. C. to you as a gentleman worthy of your confidence, and if he should have any dealings with you, we hereby bind ourselves to make good and pay any amount he may be indebted to you on settlement, not exceeding \$1500. This guaranty to remain in full force until revoked by us."—*Held*, that, in order to bind the guarantors, notice of acceptance was necessary to be given to them.

BEFORE GLOVER, J., AT RICHLAND, EXTRA TERM, JULY,
1858.

The report of his Honor, the presiding Judge, is as follows:

"The following letter was addressed to the plaintiffs, factors and commission merchants, doing business in Charleston:

'COLUMBIA, S. C., September 20, 1853.

'*Messrs. Wardlaw, Walker & Burnsides, Charleston.*

'GENTLEMEN:

'We take pleasure in commending Mr. Geo. H. Cathcart to you as a gentleman worthy of your confidence, and, if he should have any dealings with you, we hereby bind ourselves to make good and pay any amount he may be indebted to you on settlement, not exceeding \$1500. This guaranty to remain in full force until revoked by us.

['Signed,]

'JOHN HARRISON, SEN.,
'M. R. SHARP.'

"Between September 22, 1853, and June, 1855, the plain-

Columbia, November and December, 1858.

tiffs paid sundry drafts drawn on them by George H. Cathcart, the costs of the protests of several promissory notes, and reclamation on cotton, and they also forwarded to him 68 sacks of salt. George H. Cathcart's indebtedness, during that period, amounted to upwards of \$20,000, which was reduced by the proceeds of the sales of cotton, consigned by him at different times to the plaintiffs.

"The action is assumpsit, brought to recover against the defendant, on the above guaranty, a balance due by George H. Cathcart, who is insolvent.

"I refused to order a nonsuit on the grounds relied upon on circuit, and renewed in this Court; not, however, without some hesitation, arising from the want of notice of the acceptance of the guaranty. I stated to the jury, that the language employed by John Harrison, sen., and M. R. Sharp, superseded the necessity of a notice of acceptance; but at the request of plaintiffs' counsel, I submitted the question of notice to them, without, however, perceiving any evidence that could authorize the conclusion that such notice was given."

The defendant appealed, and now renewed his motion for a nonsuit on the grounds:

1. Because the guaranty did not embrace such demands and transactions as were set forth in plaintiffs' account.

2. Because it appeared that the sum of \$1500, stated in the guaranty, was paid, and paid several times over, by George H. Cathcart.

3. Because there was no proof that notice of the acceptance of the guaranty was given to the defendant.

And failing in that motion, then he moved for a new trial, on the grounds:

Wardlaw, Walker and Burnsides vs. Harrison.

1. Because the verdict is contrary to law and testimony, in the particulars set forth in the grounds of this motion for nonsuit.

2. Because his Honor, (as it is respectfully submitted,) charged the jury that notice of the acceptance of the guaranty was not necessary.

Tradewell, Bellinger, for appellant cited *Lawton vs. Maner*, 9 Rich. 335.

Gregg, contra.

The opinion of the Court was delivered by

MUNRO, J. It appears to be conceded on all hands, that the terms of the defendant's letter import a standing or continuing guaranty, consequently was not exhausted by the first extension of credit to the principal, but was to remain good to the extent of \$1500, which at any time might become due, from the principal to the plaintiffs, in the course of their dealings, until the credit was recalled or revoked by the maker. So that the sole remaining question is, was notice of its acceptance by the plaintiffs indispensably necessary, before recourse could be had against the maker for the default of the principal.

In Parsons on Mercantile Law, at page 67, the rule in reference to questions of this sort, is thus stated: "Generally an offer to guarantee a future operation, especially by letter, does not bind the offerer, unless he has such notice of the acceptance of his offer as would give him a reasonable opportunity of indemnifying himself." If we subject to the test of the foregoing rule the language of defendant's letter, as also the purpose for which it was written, everything will be found pointing, not to an existing state of things, but to

Columbia, November and December, 1858.

transactions resting in the future. The language of the letter is as follows: "Gentlemen, we take pleasure in commending Mr. Geo. H. Cathcart to you as a gentleman worthy of your confidence, and if he should have dealings with you, we hereby bind ourselves, &c." In the first place, it is manifest from the letter itself, that Cathcart, the principal, was a person then unknown to the plaintiffs. Certain it is, that previous to that time the plaintiffs had never had any business transactions with him. And secondly, the defendants' object in recommending him to the plaintiffs as a person worthy of their confidence, was obviously to induce them to extend to the principal their pecuniary aid, either in the way of funds or credit, to the amount specified in the letter.

Looking to the whole transaction in this point of view, it is impossible to escape the conclusion, that the letter in question amounts to nothing more than a mere offer to guaranty, and falling directly within the rule laid down by Parsons.

But it is impossible to distinguish this case from our own case of *Sollee & Warley vs. Meugy*, (1 Bail. 620.) In that case, upon a similar offer made by letter, notice of its acceptance by the parties to whom it was addressed, was deemed indispensable, before recourse could be had against the maker for the default of the principal, and in delivering the opinion of the Court on this branch of the case, Mr. Justice O'NEALL remarks, "It is the duty of the person giving credit on the guaranty to give immediate notice of its acceptance. The reason of the rule is obvious. If immediately apprised of his liability, the guarantor may guard against loss from the insolvency of his principal. But if he have not this notice, he may be called on to answer for the debt of an insolvent man years after he had supposed it paid."

And in the case of *Douglas et al., vs. Reynolds et al.*, (7 Peters, 131,) where, upon an offer to guaranty contained in a letter, couched in language almost identical with the one under consideration, the same doctrine was announced; Mr.

Wardlaw, Walker and Burnside vs. Harrison.

Justice STORY, in delivering the opinion of the Court says: "A person giving a letter of guaranty has a right to know whether it is accepted, and whether the person to whom it is addressed, means to give credit on the footing of it or not. It may be most material, not only as to his responsibility, but as to his future rights and proceedings. It may regulate in a great measure his course of conduct, and his exercise of vigilance in regard to the party in whose service it is given. Especially is it important in the case of a continuing guaranty, since it may guide his judgment in recalling or suspending it." And in reference to the rule requiring notice of acceptance, especially where the guaranty is prospective, the language of the same Court in the case of *Lee vs. Dick*, (10, Pet. 422,) is probably more explicit. It is as follows: "There are many cases where the guaranty is of a specific existing demand, by a promissory note or other evidence of debt; and such guaranty is given upon the note itself, or with reference to it, and recognition of it, when no notice would be necessary. The guarantor in such case knows precisely what he guarantees, and the extent of his responsibility, and any further notice to him would be useless. But when the guaranty is prospective, and to attach upon future transactions, and the guarantor uninformed whether the guaranty has been accepted, and acted upon or not, the fitness and justice of the rule requiring notice is supported by considerations that are unanswerable." The motion for a nonsuit is however dismissed, but the Court is unanimous in granting the motion for a new trial.

And it is so ordered.

O'NEALL, WITHERS, WHITNER and GLOVER, JJ., concurred.

WARDLAW, J., did not sit in this case.

New Trial Ordered.

Columbia, November and December, 1858.

URBAN W. MEADOR *vs.* GEO. C. RHYNE.*Judgments—Set-off—Equity.*

The Court will not order one judgment set-off against another where it appears that one of the judgments is owned by a third person, and that his equitable ownership was known to the party making the motion when the cause of action was given.

The practice of ordering one judgment set-off against another, is not founded on the law of discounts, but springs from the general jurisdiction of the Court over its suitors; and in exercising it, the Court will always regard the equitable rights of persons not parties to the suit.

BEFORE WARDLAW, J., AT FAIRFIELD FALL TERM, 1858.

The report of his Honor, the presiding Judge, is as follows:

"1856, Sept. 1, Meador made a sealed note for \$160, payable one day thereafter, to Geo. C. Rhyne or bearer.

"This note was credited by a payment of \$22, which Nov. 5, 1856, Meador paid to Rhyne.

"1857, March 9, Geo. C. Rhyne made a promissory note for \$2000, payable on demand to U. W. Meador: and the same day confessed judgment thereon. Judgment was entered and *fi. fa.* lodged, *instantly*.

"An indorsement on the declaration, signed by both parties, sets forth that the confession was made to indemnify Meador as surety to Rhyne on three notes, and further to indemnify him on partnership transactions between them: a valid lien being intended to subsist until Rhyne shall account.

"Of the three notes, one was a bond for \$700 with interest payable annually, dated Jan. 10, 1856, on which judgment was entered Nov. 7, 1857, against both of these parties and one Kerr: the other two notes were described by the names

, Meador vs. Rhyne.

of the payees. The affidavit of Meador shows that, on the partnership account, at least \$700 was due to him.

"1857, October, a suit on the sealed note of \$160 was brought, Geo. C. Rhyne *vs.* U. W. Meador.

"1858, April—Judgment was obtained thereon, and a rule was obtained by Meador requiring Rhyne to show cause at this term, why the judgment, Rhyne *vs.* Meador, should not be satisfied by a set-off, *pro tanto*, of the judgment, Meador *vs.* Rhyne.

"At this term, affidavits of Geo. C. Rhyne, his brother, and other persons, were read, in answer to the rule, showing that the note of \$160 was taken in payment of a buggy, which belonged to Rhyne's brother, was entrusted to Rhyne for sale, and was sold by Rhyne to Meador: that the note and the \$22 paid upon it were delivered by Rhyne to his brother before the first of January, 1857, and that the suit on the note was, for want of a written assignment, brought in the name of Geo. C. Rhyne for the benefit of his brother; but that Geo. C. Rhyne never had any beneficial interest in the note, and has had neither possession nor control of it since January, 1857.

"I discharged the rule."

Meador appealed. Because the action being in the name of Geo. C. Rhyne plaintiff, and Geo. C. Rhyne being indebted to Meador at the time of the commencement of this suit, the indebtedness of Rhyne to Meador, if it had not been reduced to judgment, would have been a valid discount against the present action, even if a third person *were* the real owner; and defendant should not be placed in a worse situation, because his demand is in judgment, than if it had remained a *chose in action*, especially when it appears that Rhyne is insolvent and has run away from the State; under which showing, it is submitted that the rule should have been made absolute and the set-off ordered.

Columbia, November and December, 1858.

Boylston, for appellant. It will be observed that all the material showing made on behalf of plaintiff is by *ex parte* affidavit, which defendant has never seen nor had an opportunity of replying to; the material showing of defendant is by record. But assume the affidavits to be true. They show that plaintiff was agent of his brother, and that the note was purposely made payable to plaintiff, because the North Carolina brother supposed if he was made payee, the note would only draw six per cent. interest. This, he alleges as the meaning of the transaction—and he therefore incurred the risk of discount, for a supposed larger amount of interest. He must abide the disadvantages. If this had not been so, still he must look to his agent, plaintiff, and not to defendant; *Hodges vs. Connor*, 1 Spear's, 126. Under the Act of 1798, if there had been an assignment, still the note would have been subject to discounts of defendant against obligee; and there was no intimation whatever, until November, 1858, that any other person but plaintiff had any interest in the suit. There is not even the memorandum that the suit is brought "for another." Defendant's affidavit shows that on the partnership accounts alone, defendant, after all credits, is *still* indebted to him over \$700. Now, if instead of a judgment, March 18, 1857, plaintiff had given a note for \$700, would not that note have been a good discount against the present action commenced seven months after? And if so, when he *did* give a note for \$2000, can it diminish defendant's right of discount, that it has been converted into judgment? It would seem from the present condition of the case, that defendant has lost, instead of secured, rights, by his diligence in converting his demand into judgment. If defendant had sued the *present claimant* on any demand, at any time until now, his *possession* of the note for \$160, would not have availed him as a discount, (assuming all his present allegations to be true,) because there has been no legal assignment up to the present time, and whatever his equities, unless

Meador vs. Rhyme.

there was a *legal* assignment to him by G. C. R. before action brought, he could not have used this note in discount to the supposed action. The holder by delivery, without assignment, of a sealed note, cannot set it up in discount against a legal demand of the maker, *Gilchrist vs. Leonard*, 2 Bail., 135; *Bishop vs. Tucker*, 4 Rich., 183. Defendant regularly appeared, and if a judgment had been matter of *discount*, it is not perceived how plaintiff could ever have recovered. The proposed set-off was defendant's only remedy; *Duncan ads. Bloomstock*, 2 McC., 319. The decision seems to be, that *equities* are to be looked to, because defendant is unfortunate enough to have a judgment, whereas *legal* rights would have been respected, if he still held his \$2000 note. The claimant's recourse, if the set-off should be ordered, is against G. C. R.; and it is his fault or misfortune, as the case may be, that he occupies that position.

Gaston, contra, cited *Tolbert vs. Harrison*, 1 Bail., 599; *Williams vs. Evans*, 2 McC., 205.

The opinion of the Court was delivered by

WITHERS, J. To what appears in the brief it is proper to add, that before this plaintiff executed the note of George C. Rhyme, upon which the latter obtained the judgment, this plaintiff would now have extinguished by a set-off, he knew that the property he bought from George C., and which was the consideration of the note, belonged to J. N., the brother of George C.

There arises out of this fact such an equity in the money secured by the note in favor of J. N. Rhyme, known to Meador at its inception, as must be influential in adjudging this question of set-off of judgments, though it might have been quite unavailing, if the question had arisen on the law of discount.

Columbia, November and December, 1858.

The argument in this Court in behalf of Meador is founded upon an analogy derived, it is contended, from our law of discount; and the incongruity is urged, that, in denying this motion, Meador is placed in a worse situation by having converted his demand against George C. Rhyne into judgment, than he would have been if he had held it to be offered in discount, when sued upon the note in favor of him.

This condition of things may well exist without settling the question now before us. The Courts of England do not exercise the power to order the set-off of judgments by virtue of the statutes of set-off, *Mitchell vs. Oldfield*, 3 T. R. 123; nor do we exercise the like power upon the footing of our law in relation to discount; *vide, Low vs. Duncan*, 3 Strob. 195. "The power springs (it is said in the last cited case) from the general jurisdiction of the Court over the suitors in it, and the equitable cognizance which it takes of their respective rights and liabilities." And with this the English view certainly agrees. The law of discount itself was passed, as its preamble recites, "for the sake of justice and to prevent a multiplicity of suits"—and such considerations, being of an equitable nature, have persuaded this Court to notice the equitable claims of those who are not parties by the rules of law—as may be found illustrated by many examples in our books; among them being *Newman vs. Crocker*, 1 Bay, 245, in 1792; and *Tibbells and Weaver*, 5 Strob. 144, in 1850. If the equities of third persons are noticed in the administration of the law of discount, as those two cases so strongly illustrate, the more readily should they be noticed in the matter of setting off judgments. There is, perhaps, less room for the introduction of equitable considerations in the law of set-off in England, than there is in the application of our law of discount; and the Act of 1798, in favor of assignees of bonds, &c. Yet in *Read vs. Dupper*, 6 D. & E. 361, Lord Kenyon said, that in strictness of law, a chose in action is not assignable; but still, according to the rules of equity and honest

Meador vs. Rhyne.

dealing, if the assignee give notice to the debtor of such assignment, he shall not afterwards be suffered to avail himself of a payment to the principal in fraud of such a notice. This is altogether agreeable to our doctrine as exemplified in *Newman and Crocker*, and *Tibbetts and Weaver*.

To show how the subject now before us is treated in England, it will suffice to refer to two cases: *Doe v. Darnton*, 3 East, 149; *Randle vs. Fuller*, 6 D. & E. 456. The first refused to set-off Darnton's judgment against one recovered against him by two others, because one of the two had, under the insolvent laws, gone into the hands of assignees, and thus had introduced the claims and interests of other persons, creditors represented by the assignees; and Lord Ellenborough took occasion to express a strong disinclination to extend the power of setting-off debts, on general grounds of equity, beyond the line which the Legislature had thought proper to mark out. The other case refused to sanction a set-off of judgments, accomplished by the parties out of Court, in disregard of the lien of the attorney for costs, which lien was known, and the claim of it, to the party chargeable therewith.

Now, in the present case, Meador, who would have set-off the judgment against him in favor of Geo. C. Rhyne, knew it was founded (so say the affidavits, the only evidence we have,) on a note belonging, in the equitable sense, to J. N. Rhyne, and knew, when he signed the note, that it was given for property belonging to J. N. R. It is further stated, that J. N. R. had possession of the note, though not assigned in law, before Meador took his confession of judgment against Geo. C. Rhyne. Now here was created an interest which, a Law Court would notice so far, that it would regard George C. as nominal plaintiff, and would not allow him to discontinue an action to the prejudice of the equitable owner, and would protect his claim in case of a rule upon the Sheriff, against

Columbia, November and December, 1858.

any equal equity at least, and if he had notice, would not sanction his payment to the payee.

Such considerations, fortified by authorities cited, conduct us to the conclusion, that the Circuit Court was right in refusing the motion for set-off; and the judgment of the same is, therefore, affirmed, and the motion here dismissed.

O'NEALL, WARDLAW, WHITNER, GLOVER and MUNBO, JJ,
concurred.

Motion dismissed.

Young vs. De Bruhl.

JACOB YOUNG vs. WM. F. DE BRUHL AND OTHERS.

Grants bearing same Date—Tenants in Common.

Where there are separate grants of the same land, bearing the same date, and founded upon surveys certified and recorded on the same day, and purporting to have been made upon warrants issued on the same day, the grantees take as tenants in common.

BEFORE WHITNER, J., AT KERSHAW, FALL TERM, 1857.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of trespass to try titles. The land in dispute was included in two grants, to different persons, of equal date, founded on surveys which had been recorded on same day, were certified on same day, and purported to have been in virtue of warrants issued on the same day. There was no parol evidence of priority, and no fact appeared at the trial bearing on that question, unless the mere circumstance that the survey under which the plaintiff claimed was recorded on the page preceding that on which the other survey was found. The plaintiff produced the grant to Sarah Kerr for six hundred and forty acres north side of Beaverdam Branch, dated 6th December, 1813, surveyed 10th November, 1813, and recorded in office of Commissioner of Locations, 11th November, 1813; and a deed from Henry Kerr, the only child of grantee, to same land, dated 1st October, 1838. There was an ancient possession within this grant, but outside of the disputed territory; nevertheless, it was often called the Kerr lands. The grantee had removed with her son to Louisiana forty years ago. Her brothers acted as her agents, and placed a Mrs. Stokes in possession, whose daughter the plaintiff married, after which he occupied the same place, and subsequently obtained the deed from the

Columbia, November and December, 1858.

son, making plaintiff's possession in the one right or the other embrace a period of near thirty years, certainly over twenty years. The house was situated near the head of Snead's Branch. One of the witnesses, about fourteen years ago, made some boards for defendant, of timber trees growing on this Branch, and testified that defendant advised him to get permission of plaintiff, but did not say that defendant referred to trees on the disputed lands. Another witness got some shingles on the lands in dispute, and got permission of both parties. A Baptist church had been built many years ago, said by many to be on Young's lands, and Young's permission was had, and perhaps a deed made by him. This was on one corner of the land in dispute, but the other grantee then claimed the land, gave permission likewise, and each party assisted in cutting the logs and building the church. The defendant relied on a grant to Patience De Bruhl for six hundred and six acres, dated 6th December, 1813, surveyed 10th November, 1813, and survey recorded 11th November, 1813. The devise of Patience De Bruhl, September 4, 1838.—Proceedings in Court of Ordinary for partition and sale, October 6, 1853, and deed from Ordinary, 7th February, 1854.

"The defendant also alleged that plaintiff had divested himself of any title he might have had by deed executed in trust, for the benefit of his children.

"The plaintiff had in his possession the original, and produced it on the requisition of defendant, with a protestation that it had never been *delivered*, and was therefore incomplete.

"It purported to be a deed from plaintiff to James Baskin, trustee of lands in dispute, in consideration of love and affection for Susan and Nancy Young, etc., bearing date 1st January, 1839, executed in presence of two witnesses, one of whom made the usual probate before a neighboring magistrate, whereupon the same was duly recorded in Register's office same year. One of the subscribing witnesses was ex-

Young vs. De Bruhl.

amined, recognized his signature, and had no doubt but that he had witnessed the due execution by all the parties, but had no recollection of the transaction.

"A surveyor proved that he had run off these lands for plaintiff, who then expressed his purpose to give it to his children; and James W. Baskins testified, on the part of plaintiff, that January twelvemonth was the first time he had seen the deed. That it had never been delivered to him, neither had he ever accepted the trusts. On his cross-examination, said he had no recollection of ever having consented to serve as trustee, though he may have done so. A certified copy of this paper should be present for reference at the Court of Appeals.

"Mrs. De Bruhl's possession, and those claiming under her, was likewise shown, and as on the part of the plaintiff, though title was set up, there had been no actual possession on the disputed lands, and the alleged trespass was an attempted clearing of a few acres of land, designated in the plat, in the opening of which, and removal of the timber, rails, etc., both plaintiff and defendant had in turn borne a part.

"The case was submitted to the jury, with such instructions touching the questions involved, as were necessary and conformable to principles well settled in the opinion, I presume, of the counsel on each side. These instructions need not be set forth, as they are not called for by the grounds of appeal.

"The inclination of my mind was unfavorable to the recovery by plaintiff, and was made known to the jury—alone from the fact, however, that being the actor, upon him devolved the burden of showing title in himself, and a *better* title than that relied on by the defendants.

"The verdict was for the plaintiff."

The defendants appealed, and moved this Court for a new trial, on the grounds:

Columbia, November and December, 1858.

1. Because the deed to James W. Baskin was duly established by the evidence, and the plaintiff was estopped from denying its effect.

2. Because the title being equal, and the possession equal, the jury should have been instructed that the verdict should be for the defendants.

3. Because the verdict is against the law and the evidence, and contrary to the charge of his Honor, the presiding Judge.

Kershaw, Taylor, for appellants.

Caston, contra.

The opinion of the Court was delivered by

WITHERS, J. The case is unique in this: that the grants under which the opposing parties claim bear the same date, the surveys were recorded and certified the same day, and purport to have been made upon warrants issued the same day. So far, therefore, as time is concerned, as to every step pursued by the grantees, they seem to be in *equali jure*. Neither grant is for the parcel of land in dispute exclusively, each covers it, but each embraces other land outside its limits. Neither grantee lived on, or used or occupied the *locus in quo*, but each resided on a portion of land within the grant. So we have not here the priority of survey which enabled the Court to distinguish between two grants of the same date, in the case of *Guignard vs. Felder*, 2 Hill, 401.

We cannot regard either of the grants as void, nor give one priority over the other. If one instrument had issued, granting the land to both, they would have been joint tenants, as at common law, without dispute. But are there not all the unities which make that estate, in the sense of the

Young vs. De Bruhl.

common law, in this instance? There is unity of time, of interest, of title, (though by two several instruments from the same grantor, issuing *uno flatu*, so far as we know,) and of possession. We can make nothing else out of this state of affairs but a tenancy in common between these parties, regarding them respectively as alienees, by mesne conveyances, from the grantees. The consequence is, that without proof of ouster neither can maintain this action against the other.

Whether Young has not conveyed his interest by deed in favor of his children becomes an unnecessary question to be decided now. It appears to some of the Court, if not to all, that the proof of delivery of the deed was sufficient; but if not, still that the statute of uses operated to vest the whole estate in the donees, and superseded delivery.

A new trial is ordered.

O'NEALL, WARDLAW, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion granted.

Columbia, November and December, 1858.

GEORGE W. HUDSON *vs.* WILLIAM C. BROWN and JOHN SMITH.

Single Bill—Agreement to compound a Felony—New Trial.

A. had a considerable sum of money stolen from him by the slave of B., a part of which was recovered, and for the balance B. gave A. his single bill, and A. did not prosecute the slave for the felony. The jury having found, upon the evidence, that an agreement not to prosecute the slave formed no part of the consideration of the single bill, on appeal, *held*, that the verdict was not so clearly unsupported by the evidence that it could be disturbed.

BEFORE WARDLAW, J., AT YORK, FALL TERM, 1858.

This was an action of debt on a single bill for \$259 50, given by the defendants to the plaintiff. The defence was that the bill was given to compound a felony.

The report of his Honor, the presiding Judge, is as follows:

"The plaintiff, living in York district, had a considerable sum of money stolen from him. His suspicions were directed towards Jake, a negro fellow of the defendant Brown, who lives in Union. He went into Union, and the matter became the subject of neighborhood inquiry. A physician practicing in Brown's family, said to Brown: 'I think Jake has the money, and if you will search his box you will find it.' Brown's wife said, 'Yes, a little negro told me Jake had a large roll of money in his box.' Brown was not then well—said he was sick—did not have Jake's box searched, and seemed unwilling to make search.

"The plaintiff applied to a magistrate of Union district. The magistrate wrote a paper which he called a 'search warrant,' and deputized a constable to whom he delivered it, for the purpose of having search made at Brown's. The constable

Hudson vs. Brown.

went under the warrant, as he supposed, and by consent of Brown; he searched by night, and in Jake's box found \$50. He stayed at Brown's and conversed with him that night. Next morning he heard from Jake that Brown had \$30 of the money; and Brown, upon application to him, acknowledged that he had \$30 which he supposed belonged to the plaintiff, and which he said Jake had given to him for a watch. Of this, Brown had said nothing the night before. During the next day the constable discovered that the paper which the magistrate handed to him had not been signed.

"In various ways, not fully explained, the plaintiff recovered a large portion of his money; still of the \$898 which he said he had lost, \$259 50 were missing. A day was appointed for a trial at Brown's. These parties and some neighbors met, but no legal proceedings were commenced. Brown said that the plaintiff would prosecute Jake if he did not get his money—that he would whip his negro himself, but he did not wish the law to whip him—that he did not want him cut up, as he intended to sell him; and that if the plaintiff would wait until January, he would pay him his money. The plaintiff agreed to wait, and thereupon the single bill sued on was given.

"That day, the plaintiff, in conversing about the matter, said, 'I have nothing more to do with it—I have Brown's note for the balance of the money, and have given all up to him.'

"On his way home the plaintiff said to a neighbor who inquired about his success, that he had got Brown's note for the balance of the money—that he had had possession of the negro, and had intended either to hold him till he got his money, or to prosecute him.

"The negro was well whipped with a strap in the presence of Brown and others—Brown making great threats to scare him, and frequently saying to him, 'I have got to pay the money, and you've got to tell where it is.' Thirty or forty

Columbia, November and December, 1858.

dollars were known to have been then and afterwards got by Brown from Jake, and those to whom Jake had given portions of the money; of this, none was paid to the plaintiff.

"I instructed the jury, that so far as the compounding of a prosecution against Jake constituted the consideration of the single bill, the instrument was void; that the right to retain money of the plaintiff which might be got from Jake, was not an illegal consideration; nor was a moral obligation, which, under certain circumstances, the defendant, Brown, might have felt himself under, to indemnify the plaintiff against the loss occasioned by the theft of Brown's slave. I submitted the facts with careful reference to the distinctions just mentioned. The verdict was for the plaintiff, the amount of the single bill and interest."

The defendants appealed and now moved this Court for a new trial, on the grounds:

1. Because the evidence was clear and uncontradicted, that the note was given to compound a felony; and it is respectfully submitted that the consideration of said note was illegal and void, and the plaintiff was not entitled to recover.

2. Because his Honor charged the jury that if the defendant, W. C. Brown, the owner of the negro boy Jake, gave the note in question to the plaintiff for the money which Jake had stolen from him, from a conviction that it was morally right for him to do so, and without any agreement to stop a prosecution for said offence, the plaintiff was entitled to recover.

3. Because there was no evidence that the note was founded on any such consideration.

Williams, for appellant. A note given to compound a

Hudson vs. Brown.

felony or misdemeanor of a public nature is void. Chit. on Con., 673, 674; *Bell vs. Administrators of Wood*, 1 Bay, 249; *Bostick*, Assignee of Wood, vs. *McLaren and Borders*, 2 Brev. 275; *Corley vs. Williams*, 1 Bail., 588. For evidence that the note sued on was given to stop prosecution, see report. A mere moral obligation to pay a demand is not a sufficient consideration to support a promise, unless a legal liability has once existed. *Mills vs. Wyman*, 8 Pick., 207; *Dodge vs. Adams*, 19 Pick., 429; Chit. on Con., 47. If consideration of note was partly, that Brown should get plaintiff's money which the negro had stolen, and which was supposed could be got, and partly that no prosecution should be had against the negro, plaintiff cannot recover. A contract is void in toto if a part of it is illegal, either by virtue of a statute or at common law. Chit. on Con., 693.

Wilson, contra, cited 2 McM., 356; *Price vs. Sumner*, 2 South., 598; *Plummer vs. Smith*, 5 N. H., 553; No. 44, Amer. Jurist, 255; Chit. on Con., 47; *Glasgow vs. Martin*, 1 Strob., 89; 2 Sp., 33.

The opinion of the Court was delivered by

WARDLAW, J. This is an appeal from the finding of the jury upon facts: for the instructions which were given informed the jury "that so far as the compounding of a prosecution against Jake constituted the consideration of the single bill, the instrument was void;" and the verdict for the whole amount of the single bill, in effect, has answered that the objectionable purpose did not enter into the consideration. This verdict is said to have been against evidence "clear and uncontradicted:" yet the appointed judges of fact have decided otherwise, and a careful examination of circumstances might lead those who would try facts by a written report of testimony, to entertain strong doubts. Let it be observed that

Columbia, November and December, 1858.

the plaintiff was not present at the conversation of Brown about whipping the negro, but when the application for time was reported to him, said that he would wait till January: further, that no legal proceedings had been instituted, the plaintiff was not bound to institute any, and nobody else was in any way restrained from doing so: that the punishment of the slave, by directions of the master given in the domestic forum, was contemplated and actually had: that the exertions of the plaintiff to recover the balance of the money, which he had lost, were arrested by the execution of the single bill, and some portion of that balance afterwards obtained by Brown; and that some unpleasant connection of the master with the possession by his slave of a large sum of money, may have stimulated his sense of an obligation to repair the damage, which too great an indulgence toward the slave may have brought upon a neighbor. It could hardly be said that no plausible view of the evidence could have been taken by the jury, under which sufficient inducements for the single bill were found, independent of any agreement or purpose of the obligee to stifle a prosecution, or hinder the course of criminal justice. Let it be admitted that the moral obligation which is spoken of in the report would not have formed sufficient consideration for a promise:—It is then merely frivolous, not illegal: and a sealed obligation which it has induced, becomes voluntary, not void. The seal importing a consideration, the instrument is none the worse because it is what the obligor ought to have made, although before making it, he was not legally bound to do so.

Objection, in the argument here, has been taken to the proposition implied in the first part of the instructions, that the instrument sued on may have been in part good, and in part bad, if part of the consideration was good, and other part contrary to policy and good morals. The verdict for the whole renders a full examination of this point now unnecessary: but it may prevent misconception to admit that the

Hudson vs. Brown.

good consideration of money to be got from Jake was too intimately connected with the bad consideration of a prosecution against him compounded, to allow of any apportionment, if both considerations existed. Those who would examine this point may find the distinction between statute and common law, laid down in 1 Mod., 35, and Hob., 14; and numerous cases explanatory of the circumstances which modify or control the distinction, collected in the case of *Armstrong vs. Toler*, 11 Wheat., 258.

The motion is dismissed.

WITHERS, WHITNER and GLOVER, JJ., concurred.

MUNRO, J., absent.

O'NEALL, J., dissenting, said, I dissent. I think that the single bill was given to compound a felony.

Motion dismissed.

Columbia, November and December, 1858.

JOSHUA A. JEFCOAT *vs.* WILLIAM KNOTTS AND JACOB
REDMUND.

Husband and Wife—Abatement—Case—Ways—Damages.

Where husband and wife join in an action on the case for obstructing a right of way, appurtenant to the wife's inheritance, and wife dies pending the action, the suit does not abate, but husband may go on and recover judgment; and in such case the measure of damages will be the whole amount of damage sustained, until the death of the wife, and afterwards a proportion equal to the husband's interest in her estate as her heir.

Vindictive or punitive damages may be given in an action on the case for obstructing a right of way.

BEFORE GLOVER, J., AT LEXINGTON, EXTRA TERM,
SEPTEMBER, 1858.

The report of his Honor, the presiding Judge, is as follows:

"This was an action on the case brought, to recover damages, occasioned by the obstruction of a private way.

"Under proceedings instituted in the Court of Equity, a writ was issued to make partition of the real estate of Benjamin Jefcoat, deceased. In their return to this writ, the commissioners allotted to Marcella Jefcoat, the wife of Joshua A. Jefcoat, and daughter of the intestate, Benjamin Jefcoat, a tract of land marked H on the plat, which accompanied their return, and they recommended that another tract, designated by the letter B, and which nearly surrounded the tract H should be sold for partition. In conclusion, the commissioners say: 'We also give to J. A. Jefcoat, and Marcella Jefcoat, his wife, from letter H, through letter B, the present road leading to the old mill.' At June Term, 1854, of the Court of Equity, this return was confirmed; the commissioner of the Court of Equity was ordered to sell tract B, and it was

Jefcoat vs. Knotts.

further ordered 'that Joshua A. Jefcoat, and Marcella Jefcoat, his wife, their heirs and assigns, have the right of way from the said tract H, through the said tract B, to the old mill, where the road now runs.' Afterwards, at the commissioner's sale, on the first Monday in November, 1854, Jacob Redmund purchased tract B, and on the 12th February, 1855, he sold it to William Knotts, his codefendant. In the Spring of 1855, the way through the tract B was obstructed by fences, enclosing a field, and a new road was opened, which deflected around the field, but was computed to be thirty-three yards shorter than the old.

"This action was commenced by Joshua A. Jefcoat and Marcella, his wife, September 29, 1855. Marcella Jefcoat died in September, 1856, leaving her husband, Joshua A. Jefcoat, and several children surviving, and her death was suggested on the record. The identity of the way was established, and it appeared that the change made by the defendants embraced about one-half of the distance between its termini.

"There was a diversity of opinion respecting the relative advantages of the two ways. Thirteen witnesses preferred the road designated by the decretal order, and obstructed by defendants, while thirteen believed that the new one substituted was as good, if not better. When the defendant's counsel commenced the examination of witnesses touching the respective merits of the two ways, I suggested that such evidence could not justify the obstruction complained of, and for that purpose was irrelevant; but, as the objection to it was not insisted upon, the witnesses on both sides were fully heard, and on this, as on many questions arising from Pond Branch litigations, the number of witnesses was equal.

"The motion for a nonsuit, on the ground on which it is renewed, in this Court, was refused, and the jury was instructed that Joshua A. Jefcoat was entitled to recover for the whole actual loss sustained, during the lifetime of his wife, and the one-third of such actual loss sustained since her

Columbia, November and December, 1858.

death. They were also informed that they were not limited to such damages, only as would recompense the plaintiff for his actual loss; but that an element entering into the estimate of damages, in cases like this, is the motive of the defendant, and that, if they saw any circumstances showing evil intention and willful conduct, they might find punitive damages.

"The actual damage consisted in the loss of some timber, which was prepared and ready to be hauled to a mill, in which the plaintiff was jointly interested, with others, when the way was obstructed. Evidence was also offered to show that plaintiff's interest in the mill, which was one of the termini of this obstructed way, was worth one dollar per day, and that the timber was supplied for this mill from the tract H, where he lived. Also, other evidence, showing, however, rather speculative than actual damage, was given. To the plaintiff's remonstrance against the obstruction of the way, William Knotts directed Redmund to put up a fence and clear a road around it. William Knotts proposed to open another road for the plaintiff, who replied that he was afraid of him; that this was the road given to him; was his only road and his right, and that if he allowed this change, after a while he would be subjected to a greater one.

"The jury, by their verdict, established the way designated by the decretal order of the Court of Equity, and found six hundred dollars against the defendant, William Knotts, and for the defendant, Jacob Redmund."

The defendant, William Knotts appealed, and now renewed his motion for a nonsuit on the ground, that the case had abated by the death of Marcella, the wife of the plaintiff, Joshua A. Jefcoat.

And failing in that motion, then he moved for a new trial on the grounds:

Jefcoat vs. Knotts.

1. Because it is submitted that the alterations made, by the defendant, of the road in question, were not such material deviations as to destroy its identity or to give the plaintiffs a right of action, and that his Honor erred in ruling and instructing the jury otherwise.

2. Because it is respectfully submitted that his Honor erred in charging the jury, that in estimating the plaintiffs' damages it was their duty to give him the value of the use of the mill, during the whole of his term, from the obstruction until the death of his wife and one-third thereof since her death to the present time.

3. Because the damages found are excessive.

Fort, for appellant. The plaintiff was bound either to join his wife in the action for the injury complained of, or he had an *election* to sue in his own name, or join his wife, as best advised; in either event, whether bound to join, or having elected to join his wife, the action, in case of *his* death, would have survived to her. It was, in fact, *her* cause of action, and nothing, for which the husband should have sued alone, could be included in such action; and, of course upon her death, the cause of action cannot survive to the husband, as a mere *survivor*. "The true rule is, that in all cases where the cause of action by law survives to the wife, the husband cannot sue alone." 1 Chit. Pl. 29, note 2; *Clapp vs. Inhabitants of Stoughton*, 10 Pick. 463. If the wife die pending an action by herself and husband for any *tort* committed either before or during coverture; and to which she is a necessary party, the suit will abate. 1 Chit. Pl. 75.

As to the alteration of the road. The changes of the road in question were not material or detrimental to the rights of the plaintiff, and gave no cause of action. And the defendant

Columbia, November and December, 1858.

denies that the proceedings in equity fixed the precise tract or exact locality of the plaintiff's way or road, so as to render it so permanent as not to be subject to improvement, if the convenience of the parties required it. "It is said that a private way by grant, and a private way *ex necessitate* after the latter has been selected, stand on the same footing." *Williams vs. Safford*, 7 Barb. 309; 3 Kent's Com. 425, 512, note 1. A right of way from necessity is by grant. 2 McC. 447. The law allows only one road (from necessity) a right of egress and ingress; but it need not always be by the same way. The party claiming the right has no cause to complain, *so a convenient way be assigned him*, even though it vary every day. 2 McC. 450. Changing a road between any two given points, for the purpose of straightening a fence, or for the convenience of the parties, so that the way is still kept open from one place to the other, I should not consider as destroying its identity. 2 McC. 451. Every immaterial change in a road is not a destruction of its identity, but it must depend upon the situation of the country. 2 McC. 445. That the use must be of the same way twenty years, but after that time slight changes would not affect the right. 5 Rich. 183.

If husband and wife had both lived to the trial, a recovery would have been had to the extent of the whole injury. But the wife having died pending the action, and nothing having been recovered, the husband now, even if the action survives to him, could recover only the one-third of the whole damages—for no part of the damages for that injury was reduced to possession by the husband. An action by husband and wife, for a proper cause, to them jointly, cannot survive to him as a distributee of her estate, after her death, for in one character he sues as *husband*, and in the other, he would have to sue or maintain the action as a *distributee*, and join the other co-distributees. The death of the wife cannot effect such a transmutation of the character of the

Jefcoat vs. Knotta.

husband, so as to sustain this action. The Court will always grant a new trial when the damages are capricious. *Poppenheim vs. Wilkes*, 2 Rich. 356.

Meetze, Gregg, contra, cited 1 Chit. Pl. 55, 56, 75, 51, 63, 64, 65; 7 Stat. 593.

Bauskett, in reply, cited, 2 Tidd. Pr. 763, 1115; 13 Eng. C. L. R. 163.

The opinion of the Court was delivered by

WITHERS, J. The plaintiffs, as husband and wife, brought their action on the case for the obstruction of a right of way declared appurtenant to the wife's freehold by a decree of the Court of Equity, in a case for partition. The wife died pending the action, her death was suggested on the record; the plaintiff, Jefcoat, was allowed to proceed as surviving on the record, and to recover for all damages arising from the tortious act up to the death of the wife, and one-third of the same arising since her death, according to his interest in her realty under the Act for distributions of 1791.

The grounds of appeal arise out of this state of facts, and such ruling upon the Circuit.

1. Did the action abate by the death of the wife?

If the action had been to try title and for damages on account of a trespass upon the wife's freehold, the death of the wife, *pendente lite*, would not have worked an abatement, according to the course of our decisions, but the husband would have the right to proceed and recover damages according to the standard prescribed on the Circuit for this case. *Syme and wife vs. Sanders and others*, 2 Strob. 332. This rule is derived from our doctrine that one tenant in common may sustain an action of trespass to try title without fear of plea in abatement or nonsuit for nonjoinder of others, and

Columbia, November and December, 1858.

from the operation of our statute of distributions, which makes the husband a distributee together with the children of the wife, both as to realty and personalty. It is fruitless, therefore, to inquire into the reasons of a contrary rule, arising from the doctrine of primogeniture in England, or any rule that may exist there requiring the joinder of tenants in common or joint tenants. The only question is, whether an action on the case for disturbing the enjoyment of an easement appurtenant to the wife's freehold, stands upon the rules affirmed in *Syme and wife vs. Sanders and others*.

It is evident that the destruction of this right of way, or its injury, was a damage to the wife's freehold, at the same time that it worked an injury to the usufruct of the husband in that freehold estate. For damages to the real property of the wife, or for a wrong which prevents the exercise of a right by husband and wife, they may join, stating the interest of the wife in the declaration; or the husband may sue alone. Vide Com. Dig., Baron & Femme, V. & X., where various instances exhibiting this doctrine are put. "If a femme sole hath a right of common for life, and she takes husband, and he is hindered in taking the common, he may have an action alone without his wife, it being only to recover damages."—Bacon, Baron & Femme, K. "If a femme sole is possessed for years of a close, to which time out of mind there hath been a way through the close of J. S. next adjoining, and J. S. erects a building *ex transverso viæ predictæ*, so that she cannot use the said way, and after she marries, the baron and femme may join in an action for the stoppage during the coverture, declaring that after the coverture they could not use the said way, etc.; because the wrong was done to the femme, and the baron had the close in her right."—*Ib.* For this, abundant authority is cited. Wherefore we see that the husband, in this case, might have alone sued for damage to such right as was exclusively his, or he may have joined his wife for such damage as was done to them both; which places

Jefcoat vs. Knotts.

the case precisely on the footing of that of *Syme and wife vs. Sanders and others*, and settles the questions as to abatement and the standard of damages against the defendants, and in accordance with the judgment pronounced on Circuit.

The only other question is that arising out of the complaint that the damages are excessive.

The damages found for the plaintiff were \$600. The sum seems very large when we advert to the evidence of any actual loss by Jefcoat. But punitive damages may be given in such an action as this—*Windham vs. Rhame*, 11 Rich. 283—and we cannot say that there was no evidence to maintain the finding of such in this instance. Unfortunately, as we think, the jury and this Court have knowledge of too litigious a habit indulged by parties to this cause and their connections in relation to real estate, and the enjoyment of it, situate on Pond Brauch, the *locus in quo* as to the present litigation. Many alternate victories and defeats, in the civil and criminal jurisdictions, have attended the fortune of what seems to be contests between families represented by these parties in this instance. Each claims rights, *stricta juris*, and that rule of decision not having been violated on the Circuit, the result there must stand unreversed, and the motions here fail, and it is adjudged accordingly.

O'NEALL, WARDLAW, WHITNER, and GLOVER, JJ., concurred.

Motion refused.

Columbia, November and December, 1858.

THE BANK OF CHARLESTON *vs.* P. P. CHAMBERS.
SAME *vs.* JOHN D. FROST.

*Promissory Note taken as Collateral Security—Evidence
—Consideration—Accommodation Indorser—Costs—
Witness.*

An indorsee who takes the promissory note of a third person as collateral security for a precedent indebtedness, is a *bona fide* holder for value, and entitled to recover the amount of the note against the parties liable when he took it; and proof that he had as yet sustained no actual loss, and had not given credit for the note to his immediate debtor, is no defence to the action.

In an action on a promissory note the plaintiff is not required to show that it was given for value; that the law presumes, and the onus is on the defendant to show want of consideration.

The drawer of a promissory note is an incompetent witness for his accommodation indorser in an action against him—the drawer being liable to the accommodation indorser for the costs of the suit.

BEFORE WHITNER, J., AT RICHLAND, FALL TERM, 1858.

These were actions of assumpsit on a promissory note for \$10,000, bearing date the 9th May, 1854, drawn by P. P. Chambers, and payable nine months after date to the order of J. D. Frost at the Bank of Charleston. The note was indorsed by J. D. Frost, and Chambers, Jeffers & Co.

J. K. Sass, President of the Bank of Charleston, testified, that in July, 1854, Chambers, Jeffers & Co., being largely indebted to the plaintiff, became embarrassed, and the bank required of them additional security; that the note was then lodged in the bank as collateral security for their debt to the bank; the note was never discounted in bank, nor credited to Chambers, Jeffers & Co.; that the date or time or perhaps both were in blank, were and filled up by Mr. Wynn, a member

Bank vs. Chambers and Frost.

of the firm of Chambers, Jeffers & Co.; that at the time of the assignment by Chambers, Jeffers & Co., their debt to the Bank amounted to \$73,300; the amount remaining unpaid was \$59,800; what portion of it would be eventually lost to the bank he could not say; judging from present appearances there will be a deficit, even if the plaintiff recover in these actions.

J. Cheesborough, cashier, testified, that there is good reason to apprehend loss to the plaintiff, even if there should be recovery in these cases.

Peter B. Lalane, discount clerk, testified to the same facts testified to by Mr. Sass; his opinion was that the bank will lose, even if the plaintiff should recover in these actions.

C. H. Simonton, is agent of the creditors of Chambers, Jeffers & Co., under the assignment. If the debt to the bank is paid at all it will be after a considerable lapse of time. For himself he is prepared to say, it will never be paid in full out of the assets of the assigned estate.

W. H. Gilliland, is the assignee of Chambers, Jeffers & Co. He thinks and hopes that the assets will be sufficient to pay off the preferred creditors, the bank being one, although the long lapse of time leaves some room to doubt.

In the action against J. D. Frost, who was conceded to be an accommodation indorser, P. P. Chambers was offered as a witness for the defendant. He was objected to as incompetent, and the objection was sustained.

The verdicts were for the plaintiff; and the defendants appealed, and now moved this Court for a new trial in each case on the ground:

Because the plaintiff, at the time the suits were instituted, had no cause of action on the note, inasmuch as the plaintiff had not discounted or paid any valuable consideration for said note, but simply had the possession of the same, by a deposit made by Chambers, Jeffers & Co., as collateral secu-

Columbia, November and December, 1858.

urity for their general debt to the plaintiff; and there was no evidence that the plaintiff had sustained any loss of the debt due by Chambers, Jeffers & Co., or any part thereof.

And in the case against Frost, on the ground :

Because it is respectfully submitted his Honor erred in ruling that P. P. Chambers, the maker of the note, was an incompetent witness on the behalf of said defendant.

Bauskett, for appellants, cited *Chit. on Bills*, 79 ; *Wiffen vs. Roberts*, 1 Esp. R. 261 ; *Jones vs. Hibbert*, 2 Stark. R. 304 ; *Brock vs. Thompson*, 1 Bail. 322 ; *Chit. on Con.* 26, 29. The note and all the indorsements were without consideration, and where that is the case the plaintiff is not entitled to recover. The bank has no authority to take notes on deposit, or to act as trustee. 8 Stat. 74. P. P. Chambers was a competent witness for his indorser. *Steele vs. Sawyer*, 2 McC. 459 ; *Cleveland vs. Covington*, 3 Strob. 184 ; *Vandiver vs. Glaspy*, 7 Rich. 14 ; *Knight vs. Packard*, 3 McC. 71 ; *Kecheley vs. Cheer*, 4 McC. 397.

Gregg, contra. The consideration was an extension of time on the paper of Chambers, Jeffers & Co., to the bank, and that is sufficient. Chambers was an incompetent witness for Frost. The general rule is as decided in *Steele vs. Sawyer*, that the drawer is not liable for the costs in a suit against the indorser, but the case of an accommodation indorser is an exception. The drawer is liable to his accommodation indorser for the costs, and is for that reason an incompetent witness for him.

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The opinion of the Court was delivered by

WHITNER, J. The appellants ask for a new trial, because

Bank vs. Chambers and Frost.

as they allege in their first ground, "The plaintiffs at the time these suits were instituted, had no cause of action on the note." Passing by the proof in the case for the present, it is submitted, whether upon the premises assumed in this ground, the conclusion is authorized. When a creditor receives from his debtor the promissory note of a third person as a collateral security, is it true as a legal proposition, that an action may not be maintained on the collateral, unless a positive loss be shown, or until the remedy against the original debtor is exhausted? This is by no means conceded. In this ground it is said "there was no evidence that the plaintiffs had sustained any loss of the debt due," whereas the force of the objection would have been acknowledged, if it had been alleged *there was evidence* of the payment of the debt once due by the original debtor. However this phase of the case need not be pressed.

The argument on the part of the appellants, proceeds upon the assumption that the note and indorsement were without consideration. The reply is brief and direct. It was not necessary for the plaintiffs to allege or prove a consideration. This the law presumes, and for the protection of such negotiable paper, the burden of proof rests with the defendants. In the case before us, we have proof of the circumstances leading to the transfer by the second indorser to the plaintiffs, but the evidence is wholly silent as to the paper in its original inception. On the trial of the second case the drawer was offered in behalf of the first indorser, who was then conceded to have indorsed the paper for the *accommodation* of the drawer, but this it must be seen in no way affects the question of consideration as to the note itself, or suggests any matter of benefit even to this indorser. Though he stand as a mere surety to the drawer, the legal presumption as readily attaches to him in this suit. He has held himself out in such way, that those taking the paper in a regular course of business are equally protected as though the value had been

Columbia, November and December, 1858.

advanced to him personally and at his own request. Stor. Pro. Notes, 194. But the evidence in fact corroborates the presumption. Chambers, Jeffers & Co., were indebted to the plaintiffs. "Additional security was required," and "the note referred to in this action was lodged with other collaterals." It has passed to the plaintiffs as a further security for a pre-existing debt. Because the plaintiffs have neither advanced the cash, nor passed the amount to the credit of Chambers, Jeffers & Co., before it is received, the startling proposition is submitted that the action cannot be maintained and the original parties are discharged from their contract.

It is to be remarked this is not even the case of a drawer attempting to set up his original equities, as against a subsequent indorsee with notice, or because transferred without value, wherein the Courts have been somewhat troubled, nor is the objection interposed by the last indorser.

But I have said the evidence shows a consideration. "Every person is in the sense of the rule treated as a *bona fide holder* for value not only when he has advanced money, or other value for it, but when he has received it in payment of a precedent debt, or when he had a lien on it, or *has taken it as collateral security for a precedent debt*, or for future as well as past advances." Stor. on Prom. Notes, sec. 195, and a copious note collect authorities on these heads. The reason is manifest. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit or forbear from taking any legal steps to enforce his rights, whilst the debtor has also the advantage of making his negotiable securities of equal value to cash. Such is the doctrine gathered from the source indicated, and such was the consideration moving to this transfer. The evidence discloses that from that day to this no steps have been taken towards legal coercion. In the effort to shift the *onus* the further proof was elicited that a heavy indebtedness yet exists, and

Bank vs. Chambers and Frost.

that plaintiffs "will lose" or "have good reason to apprehend loss, even if they recover in the above cases."

On the second ground, the case of *Cheer vs. Kleckly*, 1 Bail. 479, is directly in point. The maker of a note is not a competent witness for the indorser, in an action by the holder, when the note was indorsed for the *accommodation* of the maker. He has a direct interest in the event to the extent of the costs. This is distinguishable from the case of *Steele vs. Sawyer*, 2 McC. 459. The distinction is pointed out though not directly ruled in the case of *Cleveland vs. Covington*, 3 Strob. 184.

The motion for a new trial in each case is dismissed.

O'NEALL, WARDLAW, WITHERS, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, November and December, 1858.

BANCROFT, BETTS & MARSHALL *vs.* ALEXANDER J. MCKNIGHT.*Promissory Notes—Collateral Security.*

Where one having possession of a promissory note payable to bearer, surreptitiously transfers it to a *bona fide* holder as collateral security for advances then made and thereafter to be made, such holder, having advanced the full amount of the note before notice, may recover the full amount from the drawer, although some of the advances were made after the note fell due.

BEFORE WITHERS, J., AT WILLIAMSBURG, FALL TERM,
1858.

The report of his Honor, the presiding Judge, is as follows:

"The action was assumpsit by the plaintiffs, as bearers of a promissory note, the execution of which was admitted, and the terms of it as follows:

"'Twelve months after date, we, or either of us, promise to pay to James Eppes, or bearer, fifteen hundred dollars, value received, with interest from date: 29th November, 1852.

(Signed,)

"'NELSON & WHITEHEAD,

"'ALEX. J. MCKNIGHT.'

"The firm of Nelson & Whitehead were composed of Wm. R. Nelson and N. M. Whitehead. Wm. R. Nelson (who was late Sheriff) was out of the State, and Samuel J. Nelson died about the Fall Term of the Court, 1855.

"The defence was founded upon this, to wit: that Sam Nelson became possessed of the note in Charleston, in December, 1853, after it fell due, upon a temporary loan of \$100 to N. M. Whitehead, who deposited the note with him

Brancroft, Betts and Marshall vs. McKnight.

as collateral security, and who paid the \$100 back; but did not recover the note, because Sam Nelson had surreptitiously transferred it to the plaintiffs.

"This defence rested entirely upon the testimony of Whitehead, who, with W. R. Nelson as partner, was in trade at Kingstree in 1852, and continued that business till the end of 1853, or the beginning of 1854.

"*Whitehead* testified that the note was made 'with the intention of borrowing money from Eppes, the payee, but he had not the money to lend.' That he and Sam Nelson, being very intimate, were in Charleston in December, 1853, and falling short of money, he borrowed \$100 from Sam, and deposited this note with him until he could come home and return it; that sometime in January or February (in 1854, I suppose he meant) Sam came here, (to Kingstree;) he returned the \$100 to him, but Sam did not return the note. When interrogated as to what he told Sam when he let him have the note as a pledge, he stated that he told him the note had not been used in any way; not, that he recollected, that he had so informed this defendant, (though he said he had so told the defendant,) nor that it was not to be used. Upon being pressed farther as to what he had told Sam, he added that he told him the note had been made to borrow money, and that it had not been borrowed. Upon cross-examination, Whitehead became less positive about time and circumstances, and among the rest about the material one as to the time he parted with the note. 'My recollection is, (said he,) I am not positive, I deposited this note with S. F. Nelson in December, 1853. I won't say positive this note was in my possession after April, 1853.' He admitted that the plaintiffs had notified his firm that they held the note, but could not fix the time; it was before they were sued upon it; and when sued they made no defence. He went to Charleston with Sam when the latter first bought goods, but he could not state whether it was before or after he let him have this note.

Columbia, November and December, 1858.

Did not remember whether he himself had offered to sell the note or to buy goods with it. He told Sam he could use his name 'as a reference, if it would do him any good, not that he might use the note in particular.' He gave Sam no note or memorandum for the \$100 borrowed. He did not think he ever told John Salters that when his firm dissolved he left this note in a pocket-book in a drawer. He said that when he parted with it to Sam he was embarrassed somewhat; that he had not said much about this affair out of the Court-House; that his embarrassments had so harassed him as to affect a clear recollection of things; that the letters of Nelson and Whitehead had been neglected, scattered about, and he could give no account of them.

"*John Salters* said, that about two years ago, he asked Whitehead about this note, (at the instance, I believe, of the defendant,) and he said it was signed to raise money, and it failed to answer that purpose; and he threw it away in a pocket-book in a drawer, and did not know how Sam Nelson got it; that Sam had promised to take it up; spoke of Sam having pawned the note in Charleston, that he (Whitehead) would see that McKnight should not suffer, and he thought he need not give himself any uneasiness about it.

"*George Carey* was called for the plaintiffs, and he testified, in very positive terms, that on the 22d or 23d April, 1853, the plaintiffs derived the note now in suit from Sam Nelson, and had let him have goods upon the faith of it from time to time: the amount of \$244 09, when the note was received, for which a note (before the witness) was given, dated 23d April, 1853; that on the 8th September, 1853, he gave another note (then before him) for \$259 25; that on the 20th October, 1853, another note was given, signed Nelson & Strong, for \$576 17; and on the 4th April, 1854, another signed by the same firm for \$586 68. The two first mentioned notes Carey said he saw Sam Nelson sign; that of the 20th October, 1853, he did not know who signed; (Strong

Bancroft, Betts and Marshall vs. McKnight.

afterwards testified that he did, having become the partner of W. R. Nelson, the note having been sent up by the plaintiffs.) It turned out that Carey's information, independent of what he had gathered from the plaintiffs, whose bookkeeper he was, arose from this, which he saw and heard, to wit: That on the 22d or 23d April, 1853, Betts refused to trust Sam Nelson for goods, unless he gave security; that Sam went away, but returned to the store next day; the note now in suit was on his (Carey's) desk, and Sam proceeded to select a parcel of goods, and gave the note for \$244 09; that subsequently Sam procured goods for himself and for Nelson & Strong, as the notes above stated indicate. Carey had never seen Strong, and did not then know him. Judgments had been obtained upon all the above-recited four notes by these plaintiffs. Carey testified that from April, 1853, to the time when *this* note was placed in the hands of Messrs. Dargan & Porter for suit, it had been continuously in the possession of the plaintiffs; and he, Carey, treated it as a pledge for Sam Nelson's purchases, on any account.

"Such was the case upon which it is alleged, in the first ground of appeal, that the presiding Judge ought to have charged the jury in the terms there employed. I did not so instruct them, because I thought I ought to leave it to the jury to determine the main fact—the contested fact—whether the plaintiffs received the note after or before it fell due; and to give them instructions as to the defendant's liability, founded upon the ascertainment of that fact, one way or the other. They were so instructed, and (as I presume) in a manner not objectionable to the defendant, touching the law. The doctrine, stated briefly now, was thus laid down: that if the plaintiffs, in the course of trade, took this commercial instrument from Sam Nelson, as bearer, before it fell due, with no notice of any thing but what appeared upon its face, they could recover, against either maker, so much as was stipulated *at the time of its transfer, or before it fell due by*

Columbia, November and December, 1858.

the bearer, Sam Nelson, should be secured by it. But if the note was transferred, as collateral security, after it fell due, the plaintiffs could have no other or higher rights than Sam Nelson had, and if Sam had received it as pledge for \$100, and had been repaid, and then transferred the note, no rights would be acquired at all against this defendant. In like manner, I held that Sam Nelson could not, *after* the note fell due, though it may have been deposited before for a specific debt or purpose, enlarge the office of the note as collateral security, and perhaps I went very far for the defendant in such doctrine. It was intended to meet the question, whether any but the two notes signed by S. J. Nelson, for himself alone, should determine the amount of damages, or whether that of Nelson & Strong, 20th October, 1853, should be added; and that, also, of Nelson & Strong of 4th April, 1854. I held that such debts only could be used to fix the damages as were contracted on the faith of this note, and by agreement made between Sam Nelson, bearer, and the plaintiffs, before the note fell due. All the notes together made an aggregate transcending that of the note of this defendant; against whom the jury found the whole of the debt and interest of the note sued upon in this case."

The defendant appealed on the following grounds:

1. Because it was shown by the evidence that the note sued on was put into circulation by one of three joint and several makers, after it was past due, and it is respectfully submitted that it was not competent for either of the makers to bind the others, after the note by its own terms had ceased to be negotiable, and the presumption of an agency of either to act for the others was at an end; and his Honor should have so instructed the jury.

2. Because the note was not put into circulation until after

Bancroft, Betts and Marshall vs. McKnight.

it was due, and the testimony established that Samuel F. Nelson, to whom it was then delivered, only paid \$100 for the same, and that having been repaid to him, the verdict should have been for the defendant.

8. Because, even if the note was delivered to Samuel F. Nelson before it was due, and by him transferred to the plaintiffs before it was due, still the strongest inference from the testimony was, that it was only *pledged* as collateral security to the plaintiffs for two parcels of goods purchased from them by Samuel F. Nelson, amounting to \$504 76, and the verdict of the jury is without evidence for its support over that amount, with interest.

Dozier, for motion. Where there is nothing to warrant the finding of a jury, or when the Court cannot perceive how the jury could have drawn from the evidence before them the conclusion upon which they must have based their verdict, a new trial will be granted: *Executors of Wightman vs. Butler*, 2 Speer, 359; *City Council vs. Talck*, 3 Rich. 301; *Dogan vs. Ashby*, 1 Strob. 485; *Brassfield vs. Brown*, 4 Rich. 298; *Vierdier vs. Trowell*, 6 Rich. 169. Where the Court is not satisfied that the evidence is sufficient to sustain the verdict, a new trial will be granted: *Cox vs. Buck*, 3 Strob. 373; *Rucker vs. Fraser*, 4 Strob. 93; *Butts & Co. vs. Scott*, MSS. 185.

Dargan and Porter, contra. As to 3d ground—the only ground insisted on by defendant's counsel—Story, Prom. Notes, §§ 194, 195; 8 Ves. 531; 1 Stark. Rep. 1.

The opinion of the Court was delivered by

WHITNER, J. This case is analogous in many respects to the cases of *Chambers* and *Frost* ads. *The Bank of Charleston*,

Columbia, November and December, 1858.

in which the judgment of the Court has been already announced.

The points therein ruled need not again be elaborated. This, too, was a case in which a negotiable paper had been transferred as a collateral security, but because of the alleged existence of certain facts which might impeach its validity as between antecedent parties, certain preliminary questions were to be first settled before such defence could avail. Whether the note had been transferred before it fell due, was resolved by the jury in favor of the plaintiffs. The grounds of appeal challenging the verdict in this particular have not been pressed, and need not, consequently, be now considered.

The struggle has been to restrict the verdict to a partial recovery of the sum secured to be paid upon the face of the paper. In the true sense of the rule, as defined in the cases already referred to, the plaintiffs were *bona fide* holders for value likewise; and this rested not alone upon the legal presumption that attached, but was ascertained by specific proof; credit was at first refused, but afterwards given to the previous holder on the faith of this note when transferred; partial advances being made at the time, and at different periods subsequently, though each before the note fell due, except the last, and all before actual notice of any matter of impeachment; the aggregate of such advances transcending the amount of the note now sued upon. On the scrutiny made in reference to these advances before the jury, the instructions by the presiding Judge were highly favorable to the defendant, for he "held that such debts only could be used to fix the damages as were contracted on the faith of this note, and by agreement made between Sam Nelson, bearer, and the plaintiffs, before the note fell due." The verdict of the jury, therefore, settles the question as to any supposed distinction to be made in reference to the precise character of the advances, and as to the understanding of the parties had at the time, or at least before the note fell due.

Bancroft, Betts and Marshall vs. McKnight.

This third ground, however, complains that this verdict is without evidence to support it as to the whole amount at least. But it is to be remembered, as in the former cases referred to, the presumptions are in favor of the holder of negotiable paper, and the burden of proof is upon the defendant; it is his misfortune, therefore, if any disputed fact material to the point in issue is not clearly established by the proof. The Court must see that the verdict is against the evidence, before it is disturbed. The last advance being made subsequent to the day on which this note fell due, would seem to fall within the category of the Judge on circuit when he held that "Nelson could not, *after* the note fell due, though deposited before for a specific debt or purpose, enlarge the office of the note as a collateral security." But the consideration recognized by the authorities include future as well as past advances; Story, Prom. Notes, § 195; and in the absence of other proof, the presumption avails herein also; and surely there is nothing in the evidence to rebut the presumption that this was not within the scope of the agreement previously. Though the case we have may not require an authoritative ruling upon this point, it will at least appear that the objection as to the evidence resting on such distinction derives no aid from the mere fact of an advance after due, under the circumstances.

In looking to the relative rights of the parties, the fact of notice is manifestly the governing principle. Whence the distinction as to negotiable paper transferred *before* or *after* due? Specific proof of notice is required in the former, and this because it is indispensable to the security of commercial transactions. In the latter, no such necessity exists, the dishonor of the paper amounting to an implied notice. In the case we are dealing with, the note was transferred before due, and of course before any dishonor, and the last advance should be likewise protected, for if within the terms of previous stipulations, it is no enlargement of the office of

Columbia, November and December, 1858.

the note, and properly within the reason of the rules governing such transactions. There is no pretence of specific notice of any matter of impeachment, and the *prima facie* title of the plaintiffs to the whole paper must prevail.

The motion for a new trial is dismissed.

O'NEALL, WARDLAW, WITHERS, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

 Peake vs. Scaife.

DR. W. B. PEAKE vs. FRED. SCAIFE.

Bailment—Contract—Hirer and Letter to Hire—Physician's Bill.

A physician who attends slaves at the request of the hirer, cannot sue the owner for his bill—there being no privity of contract between them—even though the owner agreed with the hirer that he would pay all physician's bills.

In such case the hirer should pay the bill, and he then would have the right, it seems, to resort to the owner upon their contract.^(a)

BEFORE WARDLAW, J., AT UNION, FALL TERM, 1858.

The report of his Honor, the presiding Judge, is as follows :

"Assumpsit for medical services rendered to slaves of the defendant.

"To prove the items of account, the plaintiff was sworn

(a) In *Wells vs. Kennerly*, 4 McC. 123, there was no proof of any agreement as to who should pay for medicines and medical services furnished the slaves, and that case would seem to have been decided on the ground, that in the absence of such an agreement the hirer must pay for them; but there are authorities to the effect that in such case the owner must pay, and *Wells vs. Kennerly*, is not a direct authority on the point. By the general law of Bailment, the hirer is owner of the slave for the term, and bound to use him well and take care of him, 2 Kent Com. 586. He must provide the slave with suitable food and clothing; *Sims vs. King*, 18 Ala. R. 236; and with shelter, also, it is presumed; but there are strong authorities to the effect that the owner must pay for medicines and medical services. If a horse be taken sick without fault on the part of the hirer, expenses for medicines bona fide incurred are to be borne by the owner, or letter to hire. Story on Bail. § 384; 13 Johns. R. 211; and a recent writer says, "There is no implied agreement that one who hires a slave shall pay for medical services and attendance upon him in sickness." Edw. on Bail. 329, citing *Isabel vs. Norrell*, 4 Gratt. R. 176; but see 5 Mun. R. 359; 1 Bibb. R. 536; Hen. & Mun. R. 5. "Such expenses are to be deducted from the hire as in the case of a horse bailed for hire." Edw. on Bail. 329, citing 3 Barb. R. 380. The hirer had better not prescribe himself for he may become liable if he does so, *Dean vs. Keete*, 3 Camp. 24. R.

Columbia, November and December, 1858.

and adduced his book. The book showed enteries in this form: "1857, Feb. 5. Attendance on Manuel, \$5.00." The bill of particulars, which was filed, consisted of items in this form: "1857, Feb. 5. Visit and prescription for Manuel, \$2.00: mileage, \$3.00." One of the items was \$15, for attention on the same day to different slaves.

"In aid of the plaintiff's testimony, an overseer, who sent for him, testified that he witnessed the services which were rendered, and thought that, according to the rates that he was told physicians charged at, they would amount to \$115, the sum claimed by the plaintiff.

"*J. T. Jeter*, testified.—In December, 1854, I proposed to hire fellows from the defendant to work on the Spartanburg and Union Railroad: offered him \$156 a piece, "I to find clothes, &c., and lose all time, he to pay the Doctor's bill." He said he would let me know in a few days. Some weeks afterwards he said that I might have the fellows. I gave him my note for an amount corresponding with my proposal, saying nothing more about terms. I placed the fellows under an overseer on the railroad, along with others that I had hired, telling the overseer to employ a physician, in case of sickness, upon the best terms practicable. I continued to keep the fellows, and had them in 1857.

"The *overseer* testified—I had thirty-two fellows under me; ten or twelve of them belonged to the defendant. According to the directions which Mr. Jeter gave me, I sent for the plaintiff, the nearest physician I knew of. I sent only when it was indispensably necessary. All of the defendant's fellows were sick in the course of the time. One of them, Friday, was hurt between two cars: another, Manuel, was hurt by a bar of iron. The defendant gave me no directions, and did not know any thing of the services rendered by the plaintiff.

"A witness was offered to show, not a custom, but what Mrs. Sims had done in relation to some fellows of hers that were hired to Jeter. This was excluded as irrelevant.

Peake vs. Scaife.

"I ordered a nonsuit, mainly for want of privity of contract between the parties, according to the case of *Wells vs. Kennerly*, 4 McC. 123. If any distinction should have been made, in respect to slaves casually hurt, the testimony did not afford the means of making it in safety to the plaintiff."

The plaintiff appealed and moved this Court to set aside the nonsuit on the grounds:

1. Because from the evidence given in the cause, the defendant was legally and morally bound to pay the plaintiff the full amount of his demands.

2. Because the plaintiff was clearly entitled to have recovered for all such services as were rendered to the negroes, under calls on sudden emergencies.

5. Because his Honor rejected evidence offered by the plaintiff going to show the usage and custom of the country as to the payment of the doctor's bills, for hired negroes, which would have shown that it was the custom for the owner to pay medical bill.

Thomson, for appellant.

———, contra.

The opinion of the Court was delivered by

O'NEALL, J. It is true in *Wells vs. Kennerly*, 4 McCord, 123, it is said that medical attendance on a slave hired, may be the subject of contract between the owner and the person hiring: and such a course is recommended as the bill can be deducted from the wages. Beyond all doubt that case in its leading principle, that the master is not by law liable for the

Columbia, November and December, 1858.

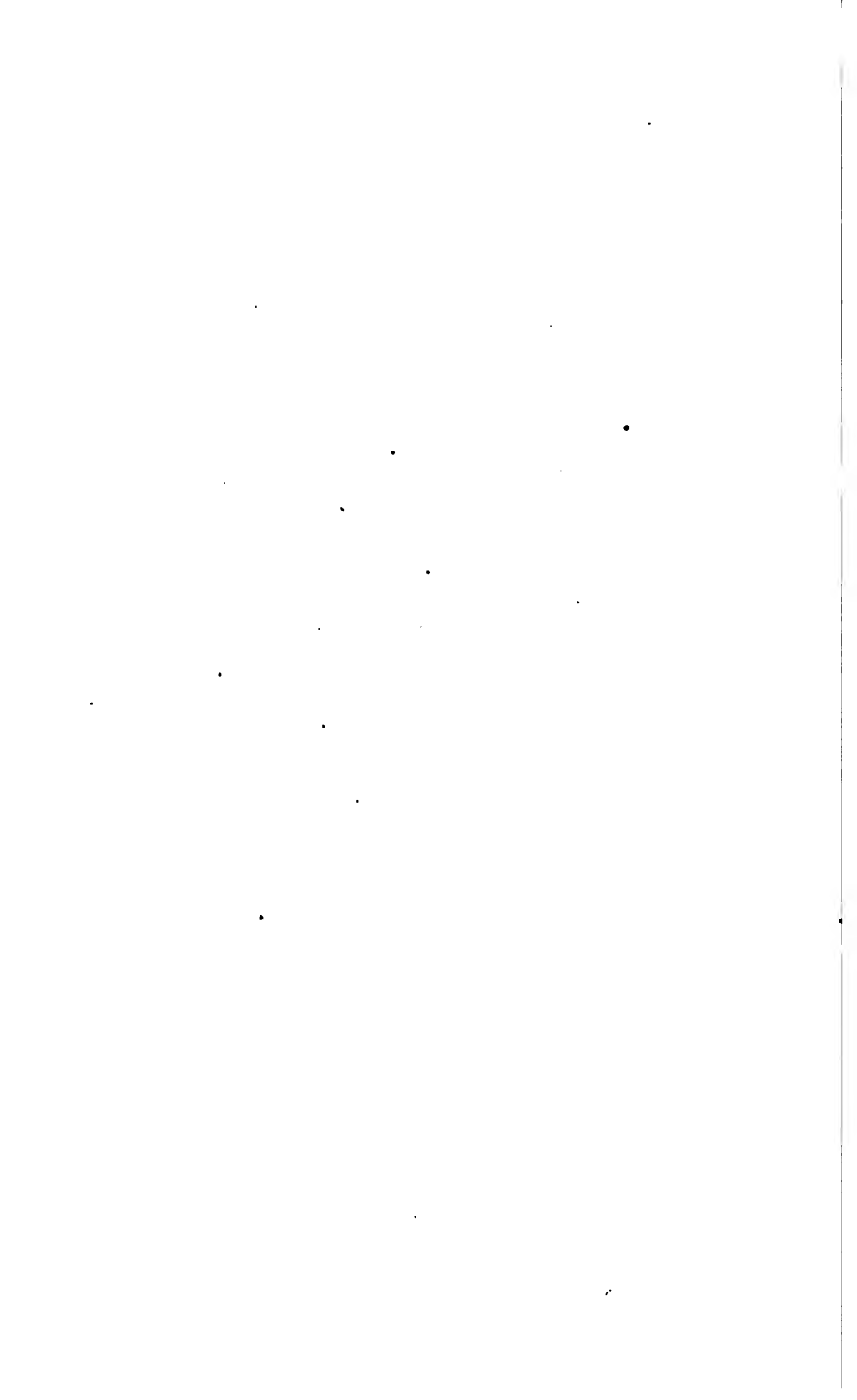
physician's bill, who attends his slave while in the possession of the person hiring, and at his request, or in the exception before pointed out, does not sustain the plaintiff's case.

Jeter, who hired the slave, and who by his overseer called in the plaintiff, is liable for his bill. It may be that he (Jeter,) can recover the amount of it after paying it, from the defendant. Between them there is privity of contract: but between the plaintiff, and the defendant, there is none.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.



APPENDIX.

Columbia—November and December Term, 1857.

THE PLANTERS' BANK OF FAIRFIELD *vs.* THE BIVINGSVILLE COTTON MANUFACTURING COMPANY.*

Bill of Exchange—Usury.

The Planters' Bank of Fairfield has authority to discount bills, drawn in this State on New York, at the usual rates of exchange among merchants.

To charge the drawer of a bill of exchange, drawn in this State on New York, a discount of one per cent. a month, the bill having forty-five days to run, is not usury, unless it be shown that the amount charged exceeds the usual rate of exchange.

BEFORE O'NEALL, J., AT FAIRFIELD, FALL TERM, 1857.

So much of the report of his Honor, the presiding Judge, as relates to the only important question of law which the case involved, and in reference to which alone the case is reported, is as follows:

"In this case the action was brought on a bill of exchange, addressed to Messrs. Flint & Bingham for \$12,500, in favor of E. C. Leitner or order, payable ninety days after date, at the Corn Exchange Bank, New York, and drawn by E. C. Leitner, agent of the Bivingsville Cotton Manufacturing Company, and indorsed by E. C. Leitner; and, without authority, he added the names of George Leitner, Simpson

* This case was decided at November and December Term, 1857, but the opinion was not filed until some time afterwards.

Planters' Bank vs. Bivingsville Manufacturing Company.

Bobo, and B. B. Foster, as indorsers. The bill was dated December 24, 1854.

"E. C. Leitner and George Leitner constituted the Bivingsville Cotton Manufacturing Company. The Act incorporating the Company made the members liable to be sued as partners; and in that character the defendants were treated. E. C. Leitner was out of the State, and was so stated, and the case proceeded against George Leitner alone, as the partner served.

"The bill was presented by E. C. Leitner to the Planters' Bank of Fairfield, to be discounted, 12th February, 1855. It was discounted at one per cent. per month, having forty-five days still to run, making an usury of \$187 50.

"The bill was accepted by Flint & Bingham, before it was discounted by the bank; it was not paid by the acceptors at maturity, and was protested for non-payment. Notice was given to the plaintiff, and thereupon notice was given through the mail to the drawers.

"I thought the transaction was usurious, and the jury took that view, for they found \$12,500 for the plaintiff, without interest, damages, or costs. Their verdict should have been the sum actually loaned, \$12,312 50, and the plaintiff ought to release \$187 50, the usury paid."

The defendant appealed, and moved this Court for a new trial on several grounds, the first being as follows:

1. Because it was proved that the bill sued upon was discounted by the plaintiff at a usurious rate; and in accordance with the legal principles laid down in the charge of his Honor, the presiding Judge, the jury ought not to have found a verdict for more than the sum actually lent to E. C. Leitner, which was \$12,312 50.

Gregg, Robertson, for appellant.

McCants, Boylston, contra.

Columbia, November and December, 1857.

The opinion of the Court was delivered by

GLOVER, J. A preliminary inquiry suggested by the argument is, whether the plaintiff is authorized, and upon what terms, to discount bills of exchange. The Planters' Bank of Fairfield, with seven others, was incorporated in 1852, (12 Stat. 212,) with the same rights conferred upon the Planters' and Mechanics' Bank, the Union Bank and Commercial Bank. By the 6th section of the Act of 1811, (8 Stat. 22,) amending the charter of the Planters' and Mechanics' Bank, it is provided, that "whereas the Union Bank of the city of Charleston have, by their memorial, prayed that they might be permitted, for the purpose of facilitating the exchange between this and our sister States, to discount bills of exchange; and whereas it appears just and reasonable that the prayer of the said memorialists should be granted: Be it therefore enacted by the authority aforesaid, that the directors of the said Union Bank and Planters' and Mechanics' Bank of the city of Charleston, may, and they are hereby authorized, whenever they shall see fit so to do, discount inland bills of exchange which may be offered them, at the ordinary rates of exchange among merchants." The word "inland" applied to bills drawn in one State, and payable in another, is certainly not technically correct. (*Duncan vs. Course*, 1 Const. R. 100, and *Bank of Cape Fear vs. Stinemetz*, 1 Hill, 44.) But if any doubt of the intention of the Legislature is created by the use of the word in that connection, it is removed by the preamble, which declares it just and reasonable to facilitate "the exchange between this and our sister States." The authority conferred was certainly not limited to bills drawn and payable in South Carolina, but was intended to embrace domestic exchanges.

The legality of the contract in this case depends more upon the rate of exchange than upon the law of usury. Current rates of exchange are so fluctuating, that if the question had been made on circuit, it could have been ascertained only by

Planters' Bank vs. Bivingsville Manufacturing Company.

evidence of the ordinary rate, and should have been submitted to the jury; but no such question was made, nor was evidence offered to show that *one per cent.* per month on a bill having forty-five days to run, is more than the ordinary rate of exchange among merchants. The opinion of the Circuit Judge was, that the transaction was usurious, and this is the first ground of the appellant's motion for a new trial. Waiving then the question of exchange, was the bill discounted at a usurious rate of interest? The detestation with which all lending of money for gain was once regarded, has become less intense, and the legal restraints and penalties imposed upon those who exact more than legal interest, have been greatly relaxed. So extreme was the execration denounced against the sin of usury in the sixteenth century, that a member of the House of Commons said, "that the usurer who taketh less because he would seem honest, shall go the Devil, because he had wittingly sinned against God, as well as the other that taketh more." Our duty, however, is to ascertain what the law is, and not to indulge in speculations respecting its policy, which devolves on those who make the laws.

It was once doubted if half yearly payments of interest, or the taking of interest at the time of forbearing was lawful; but Lord Mansfield afterwards held that it was not usury, although upon a nice calculation, it will be found that the practice of the bank in discounting bills, exceeds the legal rate of interest. (*Floyer vs. Edmonds*, Camp. 112.) So, too, the opinion of the Circuit Judge in this case—that it is usury to take more than legal interest by way of discount—is not without authority. (*Peachy vs. Osbaldiston*, 7 Mod. 353.) Subsequently, a different rule has been established, and charges are now allowed, amounting to more than the legal rate of interest, if not made pretensively to cloak usury, and are sanctioned by custom. (*Areriol vs. Thomas*, 2 T. R. 52; *Calicot vs. Walker*, 2 Anstru. 495.) The taking of interest at the time of the loan is permitted in favor of trade, and an

Columbia, November and December, 1857.

extra charge for discounting a bill rests on the ground of just compensation for trouble and expense, and should not be confounded with interest. The expense of transporting gold and silver from place to place, added to the time of payment, character of the paper, &c., produce those deviations from a par value, which the brokers daily determine.

The defendant offered no evidence to show that the rate of discount was not a fair remuneration for trouble and expense, or that the charge was made to cover usury.

It is not necessary to prove the consideration unless it be impeached, and conceding that this is an accommodation bill, it may be presumed that the plaintiff is holder for value. Under the general issue, he must prove the handwriting and make out a *prima facie* case, and afterwards, if necessary, prove the consideration in answer to the defendant's case. "Unless the bill be connected with some fraud, and a suspicion of fraud be raised from its being shown that something had been done with it of an illegal nature, as that it had been clandestinely taken away, or has been lost or stolen, (in which cases the holder must show that he gave value for it,) the *onus probandi* is cast upon the defendant." (*Mills vs. Barber*, 1 Mees. & W., 425.) The burden which the defendant assumed was, to show, that the excess retained on the discount was more than enough to cover the expense of remittance, or the difference of exchange, and used as a cloak for usury. The only proof was, that the contract was for more than legal interest; but this does not make it usurious, unless it could be also shown that the legal rate of interest is the standard of exchange.

The case of *Boisgerard vs. Fogartie*, (2 Brev. 199,) referred to in the argument, was an action against the indorser who, upon his indorsement, negotiated the note at usurious interest, and it was held, that as to him it was a new note, and, the consideration of the indorsement being usurious, the note was void. Here the action is against the drawer of a

Planters' Bank vs. Bivingsville Manufacturing Company.

bill after acceptance, and it does not appear that originally the bill was founded upon an illegal consideration, which alone could support the defence of usury, if set up by the drawer. Had it been indorsed for the accommodation of the drawer, who procured it to be discounted at an illegal rate of interest, it would have been void against both the drawer and indorser. (*Flemming vs. Mulligan*, 2 McC. 175; *Brummer vs. Wilks*, Id. 178.) If the bill was founded upon a valuable consideration and put in the market, the sale of it, at any amount below the nominal value, would not sustain the plea of usury by the drawer in an action against him by a subsequent holder.

A majority of the Court cannot concur in the opinion of the Circuit Judge, that the discounting of a bill, having forty-five days to run, at one per cent. per month, is a usurious transaction. Because it exceeded the rate of interest fixed by law, is not *per se* evidence of usury. Defendant must also prove that it exceeded the rate of exchange, which he failed to do.

For the plaintiff it has been argued, that usury cannot be given in evidence under the general issue, unless the whole consideration be usurious, and the case of *Gaillard vs. Le Seigneur*, (1 McMul. 225,) is cited. It may be inferred from the language of the Court, that when a part only of the consideration is usurious, the defendant must plead it specially. That question however was not presented by the case made, and the general rule is, that on non-assumpsit, an usurious contract may be given in evidence, except in case of a speciality, where it must be pleaded. (Com. Dig. Title Pleader E. 13.)

As the verdict includes neither interest, costs nor damages a new trial would be granted at the instance of the plaintiff; but as this is declined the motion of the defendant is refused, on the first ground. Nor do the other grounds taken, support the motion. The information elicited by the question

Columbia, November and December, 1857.

propounded to Genl. Jones, consisted of facts connected with the management of manufacturing companies, which were pertinent to the issue, and were properly admitted. The answer to the last ground will be found in *Devlin vs. Kilcrease*, (2 McM. 425.) It is not only the right but, in complicated facts, the duty of a judge to comment on the evidence, provided the ultimate decision is not withheld from the jury. Motion dismissed.

WARDLAW, WITHERS and WHITNER, JJ., concurred.

O'NEALL, J., dissenting.

In this case I shall briefly state my reasons for ruling that this bill of exchange was contaminated with usury. In the 6th § of the Act of 1812, in the amendment to the charter of the Planters' and Mechanics' Bank, is found the clause which it is supposed, notwithstanding the law on the subject of usury, permits the banks to sell and purchase bills of exchange at the enormous sums, which of late have been demanded. It enacts, that the Union Bank and Planters' and Mechanics' Bank of the City of Charleston may and they are hereby authorized whenever they shall see fit so to do, to "discount all inland bills of exchange, which may be offered to them at the ordinary rates of exchange among merchants." (8 Stat. 34.) I suppose this has been carried forward to all the banks, unless it be the Bank of the State of South Carolina may not have that power, for I see that bank, by its charter, is expressly confined to bills of exchange, within the State, (which I suppose are inland bills,) to one per cent. for every sixty days. Under the provision of the Act of 1812, what is meant by *inland bills of exchange*? If it cannot be shown, that they mean bills on our sister States, then beyond all doubt, the practice of charging more than seven per cent. per annum, can receive no sanction from that Act. From the

Planters' Bank vs. Bivingsville Manufacturing Company.

3rd clause of the Act of 1786, 4 Stat. 741, which declares such bills returned protested as liable to ten per cent. damages it would seem that they were considered *foreign bills*.

But waiving this discussion, I hold that the defendant *here* could not have been charged beyond the sum actually loaned. For it was not the purchase of a bill of exchange really and *bona fide* made. But it was a pretext to borrow money. The bill was negotiated at one per cent. per month, to enable E. C. Leitner, who had made the bill in the name of the defendant, and who had also indorsed it to obtain the money. He and the defendant were both liable for the money: and in such a case, the forbearance to demand the money from them, which is the legal effect of the bill, at one per cent. per month, makes it usury. The case of *Payne vs Trezevant*, 2 Bay, 23, which was on notes made to raise money and sold at an usurious discount, pointed out the real distinction between a loan and a sale. "Every loan contemplated a return of the money at some given or fixed period; whereas a sale was an absolute irredeemable transfer for valuable consideration never to be returned." Test this case by the rule thus given. The bill contemplated the return of the money by the defendant, if the acceptor did not pay. That was not a sale of the bill. It was a discount of it at an usurious rate of interest: and that I think can have no sanction in a Court House, where the usury law prevails. I know it is fashionable to denounce the usury law, as wrong in principle, and working badly in practice: and I once entertained such views: but I have been convinced that I was wrong, and that an usury law, such an one as ours, is wise, just and proper. It protects, as all law should, the weak, the needy, and the improvident, from the rapacious, grasping, and exacting money lender. Read the case of *T. Gaillard vs. Le Seigneur and Le Roy*, 2 McM. 229, and the wisdom and necessity of an usury law will be seen.

In 2 Brev. 199, the case of *Boisgerard vs. Fogartie*, will be

Columbia, November and December, 1857.

found. That was on the indorsement of a note bona fide in its creation ; but it was sold by the defendant at a discount considerably above the legal interest for the time it had to run, and indorsed by him. In that case the maker was clearly liable, but the usurious discount relieved the indorser. That great lawyer and judge, CHEVES, it will be seen, was the lawyer who made the defence, and that judge, whose name is and has been the subject of admiration in South Carolina, Judge WILDS, with the concurrence of his brethren, BAY, TREZEVANT and BREVARD, sustained the defence on the ground, that the indorser had forbearance, until the note was due at a greater rate of interest than was legal. How that case can be distinguished from this, it is difficult to conceive, unless something can be found in the Act of 1812, which I do not think can legitimately affect this question.

The case of *Fleming vs. Milligan*, 2 McC. 173, while it ruled that a note, bona fide for valuable consideration, brought into market may be sold for less than its value, yet it, and the case of *Brummer and Wife* ads. *John Wilks*, indorsee, 2 McC. 178, also ruled, that a note made to raise money and sold in the market, or an indorsement on which a greater sum than that which is allowed by law, is charged, will be usurious.

These cases, I think justify my ruling on the circuit, and I regret that a majority of the Court cannot sustain my decision. For I believe, that it would make the banks, and people, what they ought to be, *friends* instead of *enemies*.

MUNRO, J., concurred

Motion refused.

Mitchell vs. Bogan.

HIRAM MITCHELL vs. ISAAC BOGAN.

Mortgage—Power to Sell—Deed—Delivery.

The Act of 1791, in relation to mortgages, does not apply where the mortgagor is "out of possession." To such case the common law applies, and after condition broken, the mortgagee may maintain trespass to try title against a purchaser from the mortgagor, who has entered under his purchase.

A clause in a mortgage of real estate, giving the mortgagee power to sell is valid: *Semble*,

A mortgage of land delivered before delivery of a deed for the same land executed and dated before the mortgage, but not delivered until afterwards, takes precedence of the deed.

BEFORE O'NEALL, J., AT SPARTANBURG, EXTRA TERM,
AUGUST, 1857.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of trespass to try titles.

"Both parties claimed under Landon Hewett. On the 22d of February, 1854, he executed a deed of the land to O. P. Williams, but *it was not to be delivered until the money was paid*. On 23d August, 1854, he mortgaged the same land to the plaintiff. The deed to O. P. Williams was delivered subsequent to the mortgage. The deed to Williams was not proved or recorded.

"The mortgage was regularly proved and recorded. Hewett told the plaintiff, when he executed the mortgage, that he had signed the deed to Williams, but that *it was not delivered*.

"Subsequent to the mortgage, to wit: on the 19th December, 1854, O. P. Williams sold and conveyed the land to Bogan.

"The plaintiff's mortgage contained a power to him to sell and convey the land, if the money, to secure which it was given, was not paid.

Columbia, November and December, 1857.

"On the failure of Hewett to pay the money, this plaintiff advertised and sold the land, and at that sale he bought himself.

"The defendant, Bogan, entered upon the land, and cut down twenty-five or thirty acres, and was cultivating the same.

"I thought, as the mortgagor was out of possession, and a third person was in the possession, that the mortgagee might maintain trespass to try titles.

"I did not rely at all on the plaintiff's sale and purchase, *inasmuch as he bought himself*. But if he had sold and conveyed to a third person, *under the power in his mortgage*, I should have held such sale and conveyance good.

"I thought that inasmuch as Hewitt had not delivered the deed to O. P. Williams, when he made the mortgage to the plaintiff, that he (the plaintiff) thus obtained priority, and had of course the legal title.

"The plaintiff had a verdict."

The defendant appealed, and now moved this Court

For a nonsuit:

1. Because a mortgagee, before a regular foreclosure, cannot maintain an action in his own name of trespass to try titles against the mortgagor, or a party claiming under the mortgagor.

And for a new trial:

1. Because his Honor charged the jury that the plaintiff, as mortgagee, could maintain an action against the defendant, to recover possession of the mortgaged premises, before a regular foreclosure, when the Act of 1791 expressly declares that no mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged, even after the time allotted for the payment of the money secured by

Mitchell vs. Bogan.

the mortgage is elapsed ; but the mortgagor shall be deemed the owner of the land.

2. Because Landon Hewett, under whom plaintiff claimed as mortgagee, had no interest in the land at the date of plaintiff's mortgage, having sold and conveyed all his interest to O. P. Williams, of which the plaintiff had notice, as proved by Landon Hewett himself, plaintiff's own witness.

3. Because the sale of the premises by plaintiff, he being his own purchaser "for cash," was null and void, and as trustee he could not legally become a purchaser to the prejudice of the mortgagor, or those claiming under him.

Wright, for appellant.

Bobo, contra.

[Authorities cited: *Durand vs. Isaacs*, 4 McC. 54; *Stoney vs. Shultz*, 1 Hill Ch. 465; *Thayer vs. Cramer*, 1 McC. Ch. 395; *Taylor vs. Stockdale*, 3 McC. 302; Sugden on Pow. 472; Act, 1791, 5 Stat. 169; 10 Johns. R. 185; 4 Kent Com. 146, 190; 1 Cane Cases, 1; 2 Hill Ch. 622.]

The opinion of the Court was delivered by

WITHERS, J. In *Durand vs. Isaacs*, 4 McC. 54, an application was made to the Court of Law to foreclose a mortgage of real estate where the mortgagor was out of possession, but his alienee (it is presumed) was in possession. The jurisdiction of the Court was denied, upon the terms of the Act of 1791. That Act changed the theory of law (which, upon condition broken, made the mortgagee the owner of the land,) in the case when the mortgagor was in possession; in which case, in order to avoid delay and expense in foreclosing the

Columbia, November and December, 1857.

mortgage, and for the purpose of barring the equity of redemption, a jurisdiction (when other circumstances mentioned concurred) was given to the "Judges of the Court of Common Pleas," which our practice has interpreted to be any one of such Judges, to cause the mortgaged premises to be sold to pay the debt secured. The second section enacted, that, though the condition of defeasance had been broken, the mortgagor should not bring any possessory action, but the mortgagor should still be deemed the owner of the land, and the mortgagee should be enabled to recover satisfaction of his debt, in the manner and under the circumstances before prescribed, by the agency of the Judges of the Court of Common Pleas: "Provided (says the Act) always, that nothing herein contained shall extend to any suit or action now pending, or when the mortgagor shall be out of possession, nor to contravene in any way the ordinance entitled 'An ordinance to encourage subjects of foreign States to lend money at interest on real estates within this State;' nor to deprive any person of any right which he, she, or they may have at the time of passing this Act."

The question in the case of *Durand vs. Isaacs* was, whether the proviso recited had relation, by the words, "herein contained," to the whole Act, or only to the second section, which contained it; and it was adjudged that it had relation to the whole Act. The consequence necessarily followed, that where the mortgagor was out of possession of the mortgaged premises, the parties were left under the rule of the common law, which rule made the mortgagee the owner of the land upon condition broken. This view of the Act of 1791 (5 Stat. 169) was adopted and reaffirmed by the case of *Stoney and Shultz*, 1 Hill Ch. 465. This explicit exposition of the proper construction of the statute law leaves no other conclusion than that the plaintiff in this case is not one who is forbidden to bring a possessory action by the statute of 1791, but is one who at common law was clothed with the

Mitchell vs. Bogan.

title to the land in question, and must have the right inseparable from such title to maintain this action. This incidental right cannot be affected by that privilege which the Court of Equity might offer to a mortgagor, or other person clothed with his equity in that behalf, to extinguish the mortgage, even after condition broken, by paying all that is due to the mortgagee. The position for a nonsuit, therefore, is ill conceived, that the mortgagee cannot maintain this action until he has regularly foreclosed the right to redeem. Whether the plaintiff could lawfully buy the land at a sale made by virtue of a power to sell stipulated in the mortgage, which is the subject of the third ground for a new trial, need not be discussed; for the plaintiff was entitled to his action independent of any sale, by force of the legal operation of the mortgage itself.

This power to sell real estate, conferred by the mortgagor upon the mortgagee, is not familiar in our observation, but it is sometimes inserted in conveyances by way of mortgage of land. Nor is it liable to any legal objection. It is now usual, in England, says Mr. Coote, in his treatise on the law of mortgage, and it seems to be common enough in various of the States of the Union. Notwithstanding Lord Eldon once doubted the validity of such a power, it was exerted in his time, as may be seen in the case of *Clay vs. Sharpe*, cited in a note, 18 Ves. Jr. 346. It seems to have been adopted to serve the ends of both parties to the mortgage, accompanied sometimes with qualifications that look to investment of the surplus, or disposition of it, for the benefit of the mortgagor, and serves to avoid formidable costs of foreclosure in equity, and accumulation of interest by delay. Enough upon this subject may be seen by consulting chap. 6, p. 124, Coote on Mortgages.

It is very manifest that the sale by Hewett to Williams was ineffectual as against the plaintiff's mortgage, for the

Columbia, November and December, 1857.

delivery of the deed was subsequent to it, the mortgage being duly recorded.

The motions for nonsuit and new trial are dismissed.

O'NEALL, GLOVER, and MUNRO, JJ., concurred.

WARDLAW, J. I think that the conclusion attained by the Court in this case is legitimately drawn from the cases of *Durand vs. Isaacs*, (4 McC. 54,) and *Stoney vs. Shultz*, (1 Hill, Ch., 465): and those cases have been followed by so many others, in the construction given to the second exception which is contained in the proviso annexed to the second section of the Act of February, 1791, (5 Stat. 169,) that I will not venture to dissent now.(a)

(a) The following are copies of the Acts of 1791, and 1797, referred to in this opinion.

"An Act for establishing an easier and cheaper mode of recovering money secured by mortgage on real estates; and barring the equity of redemption; and for abolishing the fictitious proceedings in the action of ejectment.

"Whereas, mortgages are generally meant merely as securities for debts, and no actual estate is intended to be conveyed by the mortgagor to the mortgagee, but the mortgaged estate is intended, and ought to be considered, only as a pledge for the payment of the principal and interest due on the debt meant to be secured; and whereas, the present mode of foreclosing mortgages of real estates is tedious, and expensive, and the right of the mortgagor to his equity of redemption is, in the present mode of exercising that right, attended with inconvenience: Now for the easier and speedier advancement of justice, in obtaining the payment of debts secured by mortgage, and for ascertaining when the equity of redemption of the mortgagor shall be barred.

"1. Be it enacted, by the Honorable the Senate, and House of Representatives, now met, and sitting in General Assembly, and by the authority of the same, That on judgment being obtained in the Court of Common Pleas on any bond, note, or debt, secured by mortgage of real estate, it shall, and may be lawful for the judges of the Court of Common Pleas, in case of any judgment having been obtained subsequent to the property being mortgaged, and prior to the obtaining judgment in the action hereby allowed to be commenced, to order the sale of the mortgaged property for the satisfaction of the monies secured by the said mortgage, and to give a reasonable extension of the time when the sale is to take place, not exceeding the term of six months from the judgment, and also to give a

Mitchell vs. Bogan.

But my settled opinion is that that construction is erroneous; that the reasons, which have been assigned for it are

reasonable credit on the sale of the mortgaged premises, not exceeding the term of twelve months from the sale; and the mortgagor shall be forever barred, and foreclosed by such sale from his equity of redemption in as complete a manner, as if the same had been foreclosed in a Court of Chancery; any law, usage or custom to the contrary thereof in any wise notwithstanding. Provided always, that if at any time, before such sale, the mortgagor shall tender to, or pay into the hands of the plaintiff, or his agent, or attorney, or to the sheriff, all the principal money, and interest meant to be secured by such mortgage, and also the costs of the suit, the sale shall not take place, but the mortgagee shall enter satisfaction on the said mortgage, and the mortgaged premises shall be forever exempt from the said mortgage.

"2. *And be it further enacted, by the authority aforesaid, That no mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged, even after the time allotted for the payment of the money secured by the mortgage is elapsed; but the mortgagor shall still be deemed the owner of the land, and the mortgagee as owner of the money lent, or due, and shall be entitled to recover satisfaction for the same out of the land, in the manner above set forth. Provided always, that nothing herein contained shall extend to any suit or action now pending, or when the mortgagor shall be out of possession, nor to contravene in any way the ordinance entitled "An ordinance to encourage subjects of foreign States to lend money at interest on real estates within this State," nor to deprive any person or persons of any right which he, she, or they may have at the time of passing this Act.*

"3. *And be it further enacted, by the authority aforesaid, That where the same lands are mortgaged at divers times, the debts meant to be secured by such mortgages shall be paid in the order the same are recorded agreeable to law, and in no other order; any law, usage, or custom to the contrary thereof in any wise notwithstanding.*"—*Act 1791, 5 Stat. 169.*

"An Act to explain and amend the Act entitled 'An Act for establishing an easier and cheaper mode of recovering money secured by mortgage on real estates, and barring the equity of redemption; and for abolishing the fictitious proceedings in the action of ejectment.'

"Whereas under the Act entitled 'An Act for establishing an easier and cheaper mode of recovering money secured by mortgage on real estate, and barring the equity of redemption; and for abolishing the fictitious proceedings in the action of ejectment,' doubts have arisen whether a mortgagee taking a release of the equity of redemption from his mortgagor, can be considered as legally and fully seized of the premises mortgaged, inasmuch as that Act discloses that the premises mortgaged are still to be deemed the estate of the mortgagor, and only a pledge in the hands of the mortgagee, who is not thereby vested with any legal estate, and therefore cannot be benefited by such a release.

"1. *Be it therefore enacted, by the Honorable the Senate, and House of Represent-*

Columbia, November and December, 1857.

insufficient, that it strains the words used by the Legislature, and that it produces discrepancies and confusion in the application of an important statute. According to the circumstance of a mortgagor's being or not being, at some time yet unascertained, in that condition which is expressed by the words "out of possession," the rights of all persons, in any way connected with a mortgage, are widely varied. Two systems prevail in the two classes of cases thus distinguished: the number of cases in the class least numerous is considerable, if not almost equal to the number in the other; to one or the other class, a case may often be assigned at the will of one party, without consultation with others whose interests are affected, and without even notice to them: and the difference is not merely a difference in remedies, and forms of proceeding, but always a difference in legal principles and in tribunals, and sometimes in the value and extent of rights, if not their very existence. In the hope that inquiry may be excited, and that at some future time symmetry and uniformity may be restored to the law upon this subject of daily occurrence, or the reasons for the distinction, which I consider so mischievous, more clearly pointed out than they have yet been, I will indicate the views which have led to my opinion. If I should be tedious some apology for that may proceed from the high respect which I entertain for the opinions of judges from whom I will differ, and especially for those of Judge NOTT, whose arguments chiefly, I will be rash enough to assail.

The case of *Durand and Isaacs*, came to judgment in November, 1826, thirty-five years after the Act of 1791 was passed, and twenty-six years after the rule of Court to regulate the practice of ordering sales under its first section, was, without

ratified, now met, and sitting in General Assembly, and by the authority of the same, That all releases of the equity of redemption, made since the passing of the said Act, or hereafter to be made, shall have the same force and effect in law as if the said Act had not been passed."—Act 1797, 5 Stat. 34.

Mitchell vs. Bogan.

reference to any distinction between cases, adopted.(a) Then the important distinction made by the mortgagor's being out of possession, was for the first time announced.(b) The difficult circumstance in the case was that Shubael Lawrence, the person in possession of the mortgaged premises, had entered under an absolute conveyance to himself from the mortgagor, executed more than six months after the date of the mortgage, and before the mortgage was registered. Judge GANTT on the Circuit, upon application made to him by the mortgagee for an order of sale, did not, upon the supposition that Lawrence was a party before him, between whom and the mortgagee he was to decide, hold that the registry Acts gave to Lawrence's conveyance priority over the mortgage: nor did he upon the supposition that only the mortgagee and mortgagor were before him, hold that Lawrence's rights would not be affected by the order of sale, but that they would remain to be considered in a contest between the purchaser and him; but, after hearing Lawrence's affidavit, he held that the proviso, in the second section of the Act of 1791, "had no relation to the first" section, under which the Court of Common Pleas was authorized to order the sale. And then, impliedly acknowledging the relation which had just been denied, he went on to hold that "the time when the mortgagor's being out of possession shall prevent the mortgagee's obtaining an order for the sale of the lands mortgaged, must be construed to be the date of the execution of the mortgage." He added doubtfully "that an order for sale would not affect the rights of third persons, who did not claim under the mortgagor subsequent to the mortgage:" and granted the order for sale.

Judge NOTT, delivering the opinion of the Court of Appeals, then composed of three judges, first established to his own satisfaction, that the proviso, annexed to the second

(a) Miller's Comp. 16, 24, 39.(b) See Bourdeaux ads. *The Treasurers*, 1825, 3 McC. 142.

Columbia, November and December, 1857.

section of the Act, extended to the first section as well as to the second; and coming then to the exception "when the mortgagor shall be out of possession," said, "The reason of the exception is obvious. When the mortgagor is out of possession, the right of some third person must be involved, and according to the forms of proceeding in a common law Court, such third person could not be a party; and it would be nugatory to order the sale of a man's property, who was not before Court. For the purchaser would acquire nothing more than a right to bring a possessory action for the land, which is still reserved to the mortgagor by the Act. It was intended in such case to leave the party [mortgagee,] to his remedy in the Court of Equity, where he might bring all the parties before the Court, and by a single operation obtain his money or foreclose the equity of redemption, and to draw from that Court only those cases in which the parties could have an ample remedy in a Court of law, which could not be had where others than the immediate parties to the contract were concerned. I am of opinion that this is not one of the cases provided for by the Act, and that the remedy is in the Court of Equity only. The order of the Court below for the sale of the property must be reversed."

Whether the result of the case of *Durand vs. Isaacs* might be reached by some other reasoning, is now immaterial. These observations of Judge Nott, although made upon the express assumption, that when the mortgagor is out of possession the rights of some third person must be involved, and made in a case where strong rights of a third person were set up and not denied, have established as a general rule in our law Courts, that whenever the mortgagor is out of possession, the Act of 1791 is ineffectual either to give jurisdiction to the Common Pleas under its first section, or to regulate the rights of mortgagor and mortgagee under the second section. They were approved by the Court of Appeals in Equity in *Stoney vs. Shultz*, (1 Hill. Ch. 497,) and were there carried forward to

Mitchell vs. Bogan.

the results, that a mortgagee might, as at common law, enter upon the mortgaged land left vacant, or take the profits, even by distress, of those portions of it which were in the possession of the mortgagor's tenants. The case now in hand only deduces a plain corollary in holding that a mortgagee may, as at common law, recover possession of the mortgaged land, from the mortgagor's vendee.

To understand the reasons for and against the distinction which I purpose to combat, a clear conception is necessary, of the rights of various parties under a mortgage before the Act of 1791, and of the changes wrought by that Act, connected with its appendant, the Act of 1797, (5 Stat. 311,) upon cases confessedly within its operation. I will advert to only a few particulars, which may be suggestive of others.

Before the Act, the legal ownership of the land was, on the execution of a deed of mortgage, transferred to the mortgagee, subject to be divested by the performance of the condition. A legal right of re-entry, on performance of the condition, remained in the mortgagor and his heirs; but after breach of the condition, the mortgagee's estate became at law absolute and indefeasible. The mortgagor's equity of redemption after breach, not recognized at law, was enforceable in equity until it had been foreclosed, and was there considered not a mere right but an estate: the mortgage being there held to be a mere security in the nature of personal assets. An equity of redemption was not subject to the lien of a judgment, or to levy under a *fiери facias*,^(a) but in equity assignments, devises, incumbrances, and rights of succession after death, were freely permitted in reference both to the land and the mortgage—the equity of redemption on one hand, and the security attended by the legal title on the other. Upon death of the mortgagor, without previous assignment or incumbrance of his interest, the equity of

(a) 4 McC. 340; Coote on Mort. 53-6.

Columbia, November and December, 1857.

redemption passed to his devisee or heir: upon like death of the mortgagee, the land passed to his heir or devisee, in trust, for his executor, the owner of the debt secured. A union of the legal estate and the equity of redemption, constituted a perfect title; and as a sale by the mortgagee, after an effective release made to him of the equity by the owner thereof, conveyed such a title to a purchaser, so did a sale made by joint authority of the owners of the two interests, the equity and the security, such as a sale made under proceedings in equity had between these owners. A simple foreclosure of the equity of redemption made the mortgagee's title irredeemable by any person whose right had been foreclosed: but to make it perfect, all who had a right to redeem must have been made parties. So, also, a release of the equity made by the mortgagor, whilst it belonged to him, was effective; but other persons having the right to redeem were not bound by the release, if they were in no way parties to it. The right to redeem extended (with special exceptions) to all who were assignees, incumbrancers, or successors of the mortgagor's equity, and might have been enjoyed by various parties in succession; each, by paying all the debts for which the land was security, prior in obligation to his own debt, or his own acquisition of right, obtaining the legal estate, subject to redemption by those who followed him; but the right to redeem, if opposed, always required the aid of a Court of Equity for its enforcement, and was not complete in fruition until there had been a reconveyance from the owner of the legal estate. A mortgagee's right to pursue all legal remedies, for collection of the mortgage debt, was not restrained by a Court of Equity, except perhaps where after foreclosure he had rendered redemption impossible by selling the land, and then sought at law an unpaid balance: (a) any proceedings at law after foreclosure opened the foreclosure

(a) Coote on Mort. *516, *352.

Mitchell vs. Bogan.

and restored the equity of redemption. However common may have been a sale of mortgaged land decreed by the Court of Equity in this State, or in Ireland, a sale was decreed in the English Chancery only in certain peculiar cases, and always with just reference to the equities that subsisted between the mortgagor and a purchaser from him, as to the payment of any balance that stood unpaid.^(a) When a sale did take place, the right of further proceeding at law by the mortgagee for a balance seems not to have been questioned.

The Act of February, 1791 undertook, in some measure at least, to establish at law the doctrines which, before, had prevailed in equity concerning mortgages.

The first section was intended to meet so much of the title as speaks of an "easier and cheaper mode," &c., than the mode of foreclosing by bill in equity, which in the preamble is denominated "tedious and expensive." It empowers the Court of Common Pleas to order a sale of the mortgaged land for satisfaction of the mortgage debt, whereby the mortgagor shall be barred of his equity of redemption; but confines this new remedy to the case where a judgment is obtained against the mortgagor, on the bond or other evidence of the debt which is secured by the mortgage, and another judgment against him has intervened between the execution of the mortgage, and this judgment for the mortgage debt. The proviso to this section, to remove the inconvenience mentioned in the preamble, of the mortgagor's being driven to a bill in equity, for redemption after breach of the condition, allows him to procure satisfaction of the mortgage, at any time before sale, by tender or payment of the amount due.

This section might have stood alone, and so standing would have given a convenient cumulative remedy in the special case provided for. The judgment for the mortgage

(a) Coote on Mort. *512; Riley's Ch. Cases, 110.

Columbia, November and December, 1857.

debt would have been in lieu of an accounting concerning it had in equity, and the order of the law Court in place of a decree for sale made at the instance of a mortgagee. But if there had been no intervening judgment, the law Court would have been without authority to make an order of sale for satisfaction of the mortgage; and without such an order, or aid from equity, the mortgagee could not, either by himself or by the Sheriff, have sold the land discharged from the equity of redemption, nor have claimed surplus proceeds of a sale of it made under a judgment older than his mortgage, nor have enforced the redemption of it from an older mortgage. Connected with the second section, which establishes the legal ownership of the land in the mortgagor, the first section becomes more extensive in its operation; or rather, the reason for its special provision becomes apparent from the new rights which result to the mortgagee, and which render an order for sale unnecessary in many of the cases not provided for. By force of the second section, if there be no intervening judgment, the mortgagee can sell the land, now the mortgagor's, under his judgment for the mortgage debt, and take the proceeds after satisfaction of judgments older than the mortgage, if there should be any such: he can sell subject to an older mortgage; all junior judgments and mortgages he may disregard; and in general, after obtaining his judgment at law for the mortgage debt, he needs no special aid, except that given by the first section of the Act, to remove a judgment which intercepts the proceeds of his own judgment on their way to serve the lien of his mortgage. We see that the Act contemplated a general system.

The second section makes the great change in the law of mortgages, and of this by far the most important clause is that which enacts that the mortgagor shall be owner of the land, even after breach of the condition. That the mortgagee should not recover the possession, nor have any other

Mitchell vs. Bogan.

incident of ownership, is only a consequence of this clause; yet the particular concerning possessory actions is first set forth negatively, and the general affirmative rule is afterwards introduced so as to appear subordinate, as if it had been mentioned merely to illustrate *e contrario*, the prominent particular.

The proviso annexed to this section saved from the influence of the section, or perhaps of the Act, first, suits then pending; second, cases "where the mortgagor shall be out of possession;" third, the provisions of "an ordinance to encourage subjects of foreign States to lend money at interest on real estates within this State;" and, fourth, all rights which existed at the time the Act passed.

The ordinance here mentioned was passed in 1784, (4 Stat. 692.) It enables aliens, who may lend money in this State, to become mortgagees, and to prosecute suits, whether their sovereign be at war with the United States or not; to avail themselves of the covenants in their mortgages, and to obtain decrees in Chancery for the sale of mortgaged lands; but not themselves to acquire possession of the lands, or to become absolute owners thereof by any decree for simple foreclosure. The new remedy given by the first section of the Act, if it were intended to be cumulative, (as it seems plainly to be,) (1 McC. Ch. 222,) could not have hurt these foreign creditors, nor have affected the rights of their debtors, any more than every increase of facilities for enforcing contracts can be said to affect the rights of contracting parties. How, if at all, any of the provisions of the second section could have been unjust or injurious on either side, it is useless now to consider. The fear of exciting distrust, or of disturbing contracts made in reference to special legislation, no doubt, suggested in great caution the exception concerning this ordinance. To the other exceptions, recurrence will be had hereafter.

The third section of the Act was probably designed to

Columbia, November and December, 1857.

guard against evils which had been experienced from the defeat of an intermediate mortgage, by a subsequent one's acquiring, through aid of the first, the legal estate ; and from tacking, and from secret incumbrances.

The fourth and fifth sections substituted, in the trial of title to lands, the action of trespass for that of ejectment, "rarely understood but by *professors* of the law." These sections were, however, so deficient in details that at the next session of the Legislature, in December, 1791, an important directory amendment was deemed necessary. (7 Stat. 276.)

Judge Brevard, in his notes upon this Act, (1 Brev. Dig. 175,) criticizes the careless use in the first section of "Judges" for *Court*, and of "judgment in the action hereby allowed to be commenced," for *the judgment first above mentioned*. A review of the Act would point to more substantial defects, of which some have been supplied by Acts of the Legislature, rules of Court, and decided cases, and some remain to become subjects of future contention. But in the question of construction now before us, which, as will be seen, turns much upon grammatical propriety, mere trifles may serve to settle the standard of accuracy, which we should impute to the penman of the Act. Attention is, therefore, called to these words near the beginning of the second section ; "*is* elapsed," and "but the mortgager shall be still deemed owner of the land, and the mortgagee *as* owner of the money lent or due, and [he] shall be entitled to recover satisfaction for the same out of the land, &c." Would the writer of this be incapable of mistake in his use of the tenses ?

The Act of 1797, (5 Stat. 311,) shows in the preamble, the strong force which doubters had ascribed to the provision, that the "mortgager shall be still deemed owner of the land," and the forgetfulness of all third persons which prevailed in attributing a necessary and uniform effect in all cases to a transaction between *mortgagor* and *mortgagee*, if those words are to be understood in their narrow, literal sense, as descrip-

Mitchell vs. Bogan.

tive of only two individuals. The enactment gives effect to what it calls "releases of the equity of redemption:" a clear misnomer Judge NOTT says, in *State v. Laval*, (4 McC. 340;) an inconsistency to which only legislative power could give effect, Judge BREVARD seems to think, (1 Brev. Dig. 177, note.) The Act of 1797 certainly does not, by its words, conduce to a clear conception of the scheme of the Act of 1791, but its purport and effect are easily reconciled with that scheme, when that has been clearly perceived.

Throughout the Acts of 1791, and 1797, (as has been just hinted at in reference to the latter,) *mortgagor* and *mortgagee* only are mentioned, without allusion anywhere to the transfer of the rights of either party, by act in his lifetime, or by his death. Yet it surely was intended, and such has been the received interpretation, that the assignee or executor of a mortgagee should have the same rights and remedies as he himself had: all to whom his rights come are included under the term *mortgagee*. In like manner the heir or devisee of a mortgagor must have been intended to have, and has been understood to have, the same legal ownership and the same right of disencumbering the land by payment, as the mortgagor himself. The inference is natural that the term *mortgagor* included every one who should stand in the place of the mortgagor, who should have his legal estate and his right to disencumber it, whether heir, devisee, donee or vendee. Amidst the changes and divisions of right, which the acts and death of the mortgagor may produce, a class of third persons might arise, who would have, at law or in equity, his right to disencumber the mortgaged land for their benefit, but not his legal estate in it,—such as his executor, his subsequent mortgagee, his judgment creditor, and various representatives and encumbrancers of his alienee or successor. These the Act could not, for many purposes have embraced under the term *mortgagor*, although their rights spring out of and are regulated by the enactments concerning the mortgagor.

Columbia, November and December, 1857.

Here it may be observed, that although the distinction, (which is still kept in view, however distant,) rests upon close adherence to the very words used in one part of the Act, its supporters must admit a wide extension of other words, by intendment.

After this examination of the Act of 1791, and its exegetical supplement of 1797, a hasty view of the changes wrought by it, in cases confessedly within its operation, will bring us to a special consideration of the distinction, that excepts many cases from these changes, and of the reasons which have been assigned in its support.

Under the Act, an instrument called a mortgage has a meaning widely different from that which its words, in its ordinary form express: as different as the condition expressed in a bail bond is from the condition which by statutory authority, is imputed to it.^(a) If a mortgage were written so as to conform exactly to its legal meaning, it would be hard to range it under any known head of the law: and without respect to form, it must be treated as if it were so written. It is not a conveyance, either under ancient law or under the Statute of uses; for it transfers no estate in the land whatever. It is not the acknowledgment of a condition subsequent, by which the estate of the mortgagor may be defeated, nor the stipulation by the owner of land of a covenant, which runs with the land and imposes a burden on it; for such a condition, or such a covenant, can be created only when an estate in the land is transferred. Perhaps, it might be properly considered the creation of a power to be exercised on contingency: but no ordinary creation of a power without an estate has its encumbering effect. It is an agreement by deed properly attested, which is permitted by intendment of the statute law, to cause a lien upon the land mortgaged by it; and effect is given to the lien through an irrevocable power to sell the land, or procure the sale of it, in a certain

(a) 1 Strob. 308.

Mitchell vs. Bogan.

manner and upon a certain contingency. This power, express or implied, is contained in the agreement, and the execution of it has relation to the deed which created it.

Many of the terms of art appropriate to a common law mortgage are not strictly applicable to this, our mortgage under the Act of 1791, and when applied to it, tend to mislead, if their signification be not properly modified. There can be under the Act, no *redemption*, before sale for satisfaction, for no estate to be redeemed, has passed from the mortgagor, or those who hold under him, until a sale which bars their title. What is generally called the *equity of redemption*, is a *legal* right in the *owner* of the land to disencumber it: if in one who does not own the land, there should be an *equitable* right to satisfy the mortgage for his own benefit, it would be, before sale, an equity to *disencumber*, and not to *redeem*: in possible cases, after sale, a right to *redeem* might exist. There can be no *simple foreclosure*, for if all right to disencumber was taken away, and nothing more done, there would still be no estate in the mortgagee. The *release of the equity of redemption*, is a conveyance of the land to him who has the incumbrance.

With the debt secured by the mortgage may pass the security, and whatever right, legal or equitable, the act or death of the mortgagee, or of any person deriving right from him, can give to another in the debt, the same may it give in the security, if that remain undischarged.

The mortgagor and every person who acquires his estate, may alien, encumber and in every way dispose of the land, as if there was no mortgage: the land remaining, in the hands of every one to whom it may come, subject to the original lien, (if there be no special equity exempting it,) and that lien remaining liable to be satisfied by every owner of the land, until the sale for satisfaction shall have been had.

So long as the mortgagor remains owner of the land, every judgment against him acquires on the land a legal lien(a) sub-

(a) 1 McC. 344; 4 McC. 341; 5 Rich. Eq. 1.

Columbia, November and December, 1857.

ject to the mortgage: and so subject the land may be sold under any *fi. fa.* against the mortgagor subsequent to the mortgage. After the mortgagor's estate has been transferred by him, or has descended from him, the land is in like manner liable to lien and sale under judgments against every subsequent owner of it. Thus an interest to disencumber—even a legal title, or a lien in the land—may be acquired by classes of persons, who could not at common law have been amongst those who might be entitled to the equity of redemption.

We come now to the important words contained in the proviso annexed to the second section of the Act of 1791, "when the mortgagor shall be out of possession."

When shall the mortgagor be said to be *out of possession*? When the possession is vacant? (*Stoney v. Shultz*.) When his tenant at will is in? his tenant for years? (*Stoney v. Shultz*)—his heir or devisee? his vendee who bought and entered, without notice, after the execution of the mortgage? (*Durand v. Isaacs*), or one who entered with notice? or one who bought and entered before the execution of the mortgage? an owner by a title superior to any he ever had? an adverse occupant? a casual trespasser upon a constructive possession?

To what exact time does this being out of possession refer? to the date of the mortgage—the filing of the suggestion required by the forty-second rule of Court—the service of the ten-day rule—the obtaining of judgment for the mortgage debt: or the sale for satisfaction?

If the mortgagor is legal owner when he is in possession, and the mortgagee becomes legal owner when the mortgagor is out, what effect, if any, would, in various cases, be produced by a re-entry of the mortgagor? Say before breach of the condition, and after; before and after the expiration of a lease made by him; before and after a certain time from a vacancy left in the possession? If the legal title cannot again shift without writing, after the mortgagee has once entered,

Mitchell vs. Bogan.

who is legal owner in the interval between the mortgagor's going out and the mortgagee's entry?

Can the mortgagor, by abandoning the possession or putting in a tenant, at any time before the mortgagee commences proceedings to procure a sale, at his pleasure deprive the mortgagee of the cheaper and easier remedy under the Act of 1791? Can he, at the same time, divest all his own judgment creditors, who obtained judgments against him after the execution of the mortgage, of the liens which they had at law on the mortgaged land, whilst he was legal owner of it? If he had remained in possession, under arrangement with his vendee, to whom he had conveyed, can he also affect the liens on the land, which judgment creditors of that vendee had acquired? If his vendee is in possession, what is the nature of the right which would be acquired in the land by judgments against the vendee, after the mortgagor went out?

If the mortgagee is legal owner when a vendee of the mortgagor is in, why does not the statute of limitations run in favor of the vendee against the mortgagee's right? (See *Thayer vs. Cramer*, April, 1826, 1 McC. Ch. 397; *Nixon vs. Bynum*, 1829, 1 Bail. 150; *Thayer vs. Davidson*, Bail. Eq. 426; *Smith & Cuttino vs. Osborne*, 1 Hill Ch. 342; *Drayton vs. Marshall*, Rice, Eq., 380, 385; 4 Rich. Eq. 164; 5 Rich. Eq. 81.) In *Thayer vs. Cramer*, decided only a few months before *Durand vs. Isaacs*, a vendee was in, yet Judge NOTT, so far from considering the Act of 1791 inapplicable to the case, rested his opinion upon the force of the Act. In *Nixon vs. Bynum*, two years after the decision of *Durand vs. Isaacs*, again a vendee was in, and again Judge NOTT, forgetful of the distinction made by the mortgagor's being out of possession, refers to the Act, and that in the case of a mortgage which preceded it. In *Thayer vs. Davidson*, mortgages of real estate in general are distinguished from those of personality. In *Smith & Cuttino vs. Osborne*, again a vendee was

Columbia, November and December, 1857.

in possession, and the Act of 1791 invoked to save the mortgage from the operation of the statute. In *Drayton vs. Marshall*, Chancellor Harper showed that the statute will run against a mortgagee, who has the fee and may sue for the possession, and expressed his opinion that the cases of *Thayer vs. Cramer*, and *Smith & Cuttino vs. Osborne*, cannot be reconciled with the decision in *Durand vs. Isaacs*, and *Stoney vs. Shultz*, which he considers to have determined, "that where the mortgagor is out of possession, the Act of 1791 has no operation at all, but the mortgage remains in every respect as at common law; that is to say, that by alienating the land and transferring the possession, the legal title becomes vested in the mortgagee, who may forthwith bring his action at law, if the mortgage be forfeited."

If a mortgage is in the hands of a mortgagee's executor, who is owner of the money secured, and the mortgagor dies in possession, or transfers the possession to his vendee, does this death or transfer avail to convey the legal estate to the heir of the mortgagee, in trust for his executor?

The resolution of these questions will, I think, bring conviction that "the reason of the exception is *not* obvious;" that it is even unsafe to assume that, according to the meaning of the Legislature, "when the mortgagor is out of possession, the right of some third person must be involved;" and that there are difficulties yet to be overcome, before the lines of the great distinction that has been made can be clearly settled. It will, perhaps, appear highly probable that the Legislature, in framing the exception which has been made so important, thought not of the distinctions between practice at law and practice in chancery, nor of the rights of third persons, but only, as I will attempt hereafter to explain, of a restriction, obviously proper upon the general rule of ownership which had just been enacted.

It is inferring the sense of the Act from matter extrinsic and subsequent, to advert to the forms of proceeding since

Mitchell vs. Bogan.

adopted in our law Court, and say that according to them a third person could not be made a party. For aught that is to be found in the Act, or in the nature of a law Court, those who adopted the Act may be supposed to have expected that a third person would, when necessary, be so brought forward that his rights might be adjudged, and be concluded by an order of sale made under the first section. Power is given to the Court of Common Pleas to order the sale in the state of affairs specified; but in the defectiveness of detail which prevails throughout the Act, there is an omission of all direction concerning proceedings which should precede the order. Some notice and some exact statement of matters which might be confessed or traversed, must of course have been approved,(a) if ever the course which would be taken was contemplated by the framers of the Act. In 1800, a rule of Court was adopted, which has remained unaltered ever since, requiring a suggestion and a rule to show cause. It directs the rule to show cause to be served on the *defendant* in the action brought for recovery of the mortgage debt; but familiar proceedings against garnishees in attachment, and in rules to show cause why satisfaction of a judgment or mortgage should not be entered, and in other cases of suggestion and rule to show cause, make it plain, that there would be nothing inconsistent with the practice of the Common Pleas, for the rule of Court to require notice to be given to any third person in possession of the mortgaged land; and for the Court, in default of sufficient cause to the contrary shown, to make an order conclusive of such person's rights. Even exhaustion of the other means of the mortgagor, before resort to the mortgaged land, might be effected by suitable delays and directions in the order for sale, in cases where the rights of vendees, devisees, subsequent mortgagees, or other third persons, brought to the view of the Court, de-

(a) 4 MoC. 265.

Columbia, November and December, 1857.

served special favor. In at least one reported case, third persons were made parties to the suggestion by notice, and no objection seems to have been taken. *McClure vs. Mounce*, 2 McC. 424; Cont.(a) The prevailing practice should not be considered to furnish a legitimate exposition of the Act, unless it appears to employ all the power which the Court might under the Act exercise.

The argument in favor of the distinction in question, asserting the incompetency of a common law court to give ample remedy, where any person besides the "immediate parties" to the mortgage is concerned, sets forth the circumstance of the mortgagor's being out of possession as a criterion, by which, according to the intention of the Act, those cases in which resort must be had to the Court of Equity, where by a single operation justice might be done to all parties in interest, may be distinguished from the other cases, in which the order for sale made at law would be adequate. I do not profess to be familiar with equity practice, and do not feel that any doubtful proposition is necessary to the support of the general opinion which I have upon the matter in hand. But upon this, which is the main head of the argument I have to meet, some reference to equity practice, and some alternative views of matters, upon which two opinions may be held, will serve to show that the division of cases between the two Courts, which has been imputed to the Legislature, however specious, is not sound.

A Court of Equity, dealing with a common law mortgage, does not, in general, consider any person entitled to redeem, besides those who can show a title to the estate of the mortgagor, (the equity of redemption;) if there be fraud or collusion to the detriment of third parties,(b) as if assignees, executors, or trustees refuse to enforce their right, creditors or other parties interested may file their bill for relief.(c)

(a) Cont. 3 McC. 146.

(b) Coote, *537.

(c) Barnard R. 30.

Mitchell vs. Bogan.

Judgment creditors, who have an equitable lien on the mortgagor's equity of redemption, coming in to redeem, must make the persons legally entitled to the equity of redemption, (a) such as executors or assignees of a bankrupt, parties to their bill. In a bill for foreclosure, parties should be made of all persons directly interested in the result—the persons entitled to either the legal estate, the money, or the equity of redemption. The eldest mortgagee has the legal estate, and he only can have such a foreclosure as establishes an indefeasible, irredeemable legal title: persons who became mortgagees or assignees of the equity of redemption, or creditors by judgment against the owner of it, after the filing of the bill, are affected by the notice which arises from *lis pendens*, and are bound by the decree without having been made formal parties. With respect to all intermediate encumbrancers, the rule appears to be that the decree of foreclosure will bind all those who are parties to the bill, but not the rest; (b) and, consequently, a second mortgagee or other subsequent encumbrancer, who is not a party to the bill, may, on payment of the first mortgage debt and costs, redeem the first mortgagee, after the decree obtained, although the first had no notice of the other incumbrance at the time of the decree. To the conclusive adjudication of the rights brought before the Court, it is not indispensable that parties should be made of the representatives of all the rights, (c) which the Court, in its desire to do full justice and prevent circuitry, would require to be presented, if they were known to it. Thus, it is good cause of demurrer to a bill of foreclosure filed by the heir of the mortgagee, that the executor of the mortgagee is not a party; (d) and even if the bill be not demurred to, but it comes out in the course of the hear-

(a) Coote on Mort. *552, *55.

(b) Coote, *522; 2 Vern. 518; Calvert on Parties in Equity, *128-137.

(c) 2 Hill Ch. 87; 11 Wheat. 304.

(d) Coote, *519.

Columbia, November and December, 1857.

ing that the executor is not a party, the plaintiff cannot, it seems, be permitted to proceed; but, nevertheless, if the cause proceed, and a decree is obtained by the heir of the mortgagee without the executor, it will be binding on the mortgagor; and it seems the heirs of the mortgagee may either pay the mortgage debt to the personal representative or give up the estate.

A sale for satisfaction of a mortgage is in its nature a more conclusive proceeding than a simple foreclosure, and it introduces the rights of a new party—the purchaser. It is therefore important that all persons who should have been parties to a foreclosure, should be before the Court when it orders a sale. And this is made still more imperatively necessary by the character of the decree usually rendered by our Court of Equity, for a sale and the payment of the balance, if any—to the mortgagor or other person entitled, if there should be a surplus after satisfaction of the mortgage;(a)—by the mortgagor or his representative, if there should be a deficiency after sale. Therefore, the executor of a mortgagor, not an indispensable party to a bill for foreclosure, should here be a party to a bill for sale and payment.(b) But the judgment creditors of the mortgagor, and of his immediate alienee, and of a subsequent alienee of the land, (now the owner of the legal title,) through whom may be numerous legal liens on the land, would probably not without some special equity be here considered necessary parties, even since the Act of 1791;(c) every creditor being usually understood to be represented by his debtor, who, if entitled to either the money or the land, should himself be before the Court. The *terre*

(a) *Gray vs. Toomer*, 5 Rich. 266; Bail. Eq. 220; Riley's Ch. C. 120; 1 MoC. Ch. 227.

(b) 3 P. Wms. 333, in notes; Riley's Ch. Cas. 111; MoM. Eq. 188.

(c) See *Haines vs. Beach*, 3 John. Ch. 459; *Finley vs. U. S. Bank*, 11 Wheat. 304; *Bank vs. Black*, 2 MoC. Ch. 344; *Felder vs. Murphy*, 2 Rich. Eq. 58; *Rice's* Eq. 393; 2 Rich. Eq. 185; 5 Rich. Eq. 1.

Mitchell vs. Bogan.

tenant, the mortgagee would be always justified in making a party ;(a) for what the nature of his right the mortgagee may not know, and, as far as practicable, the price should be advanced at the sale, by quieting all apparently opposing claims. But if it should appear to the Court that the *terre tenant's* interest is only that of a tenant at will, or a tenant for a year, whose term would expire before the sale, justice in the particular instance would be sacrificed to the preservation of valuable formalities, if delay should be had to make him a party. Suppose, however, that the fact of there being a tenant, or a vendee of the mortgagor, should not be brought to the knowledge of the Court, and under a bill by mortgagee against mortgagor, a decree and sale should take place—what would the purchaser acquire? The decree would be good between the parties, and the purchaser would acquire all that their conjoint rights could, at the filing of the bill, have conveyed.(b) A title or incumbrance superior to the mortgage, whether derived from the mortgagor before execution of the mortgage, or paramount to his title, would be unaffected by the sale. If lessee for a term was in under a lease prior to the mortgage, and that was in fee, the purchaser would acquire the mortgagor's reversion. If there had been a lease or sale by the mortgagor subsequent to the mortgage, and no default of registration had caused a transposition of priorities, the purchaser would acquire, by relation to the date of the mortgage, a right to the land and to the immediate possession of it, if the legal title was in the mortgagor at the filing of the bill. If the legal title were then in a third person, perhaps he would acquire only the mortgagee's rights against that person ; possibly, as hereafter mentioned, only an equity to be reimbursed out of the land the amount of his bid, not exceeding the mortgage debt. Where he acquired the right to immediate possession, he could not enforce it, under an order of possession contained in the decree, against any person who

(a) *Cruger vs. Daniel*, McM. Eq. 196, 174.

(b) *Bail. Eq.* 338.

Columbia, November and December, 1857.

was not a party or privy to the bill, or affected by the notice arising from *lis pendens*. He could, however, assert his right by action against any occupant who resisted it; although against any person who could not, as above, be turned out under an order, the decree would not be conclusive, and he would be compelled to establish by evidence *aliunde* the execution of the mortgage, and subsequent entry under the mortgagor; and would be liable to any defence that might show invalidity of the mortgage for fraud or other causes, or its discharge by payment or other means. The chief difficulty is, that the purchaser might be liable to redemption or disencumbering (one or the other, according as he should, or should not, be held to have acquired the legal title) by any person who held the mortgagor's legal estate, or a specific lien on it, and had not, by being made a party, received regular notice of the sale before it was made. I am aware that a notion has prevailed, and to some extent is countenanced by *dicta* in our reports, that registry is such effectual notice to all the world that a purchaser from the mortgagor, when the mortgage has been duly registered, not only takes subject to the lien of the mortgage, but is made a privy so as to be bound by proceedings against the mortgagor. If this is correct, there would rarely be an occasion for a purchaser to desire more than a decree against the mortgagor. Sometimes a mortgagor's vendee may have peculiar claims to favor, as where he bought without notice of the mortgage, after its execution but before its registration, and before the expiration of the prescribed time for registration, within which time it was registered. Beyond such special cases there seems, however, in general, great force in the reasons which every vendee of a mortgagor might urge, in support of his right to redeem or disencumber, after a sale under proceedings to which he was not a party. He might well say that registry, although notice to prevent the acquisition of priority by a subsequent conveyance, and to rebut a plea of purchase for valuable

Mitchell vs. Bogan.

consideration without notice, (a) is not notice for all purposes; that notice of an instrument claimed to be a mortgage being registered, may be accompanied by notice that it is forged, or fraudulent, or paid, or released, or otherwise invalid; that after a mortgagor's conveyance of the land, his vendee should no more be bound by his acknowledgments, default, or unsuccessful defence, than by his second conveyance, or his direct collusion with the mortgagee; and that as, in conformity with the indulgence which in equity was intended to prevent forfeiture upon breach of the condition, an express notice to the mortgagor is required by the Act of 1791 as well as by equity practice, giving him full opportunity for payment before the sale, so the same notice and opportunity should be given to a third person who has acquired the mortgagor's estate with its incidents, before he should be barred of his right to disencumber or redeem.

Admit then that when a sale has taken place under a decree made on a bill by mortgagee against mortgagor, a vendee of the mortgagor, not a party to the bill, may hold the land by paying the mortgage debt. If the purchaser has bid just the amount of the mortgage debt and costs, (b) the sale is in effect an assignment of the mortgage, and upon the vendee's payment, the purchaser would be reimbursed although disappointed of his purchase. If the purchaser has bid less than the mortgage debt, and the balance has been collected from the mortgagor's other assets; the purchaser may possibly be restricted to reimbursement of his bid, by an equity which would be in either the mortgagor or his vendee, according to the circumstances which should or should not make the vendee's title subject to the obligation of paying the mortgage debt. (c) And if the purchaser has bid more than the mortgage debt, and the excess has been ap-

(a) Bail. Eq. 422.

(b) 1 Hill, Ch., 499.

(c) 2 John. Ch., 128; 5 Rich. Eq. 1.

Columbia, November and December, 1857.

plied to judgments against an insolvent mortgagor, the purchaser's reimbursement may be limited, by the extent of the vendee's liability, to a sufficiency to satisfy the mortgage.

It is plain that there are cases where conflicting claims and complicated circumstances would so depress the price, if all parties in interest were not bound by the proceedings, that it would be expedient for a mortgagee not only to resort to the Court of Equity, but to be careful that all persons interested should be concluded by the decree. And it is not doubted that the Court of Equity would be watchful to have all proper parties brought before it, and where existing interests had in the progress of a cause been concealed from its view, would protect them when afterwards they should claim recognition. But a decree had between mortgagee and mortgagor only, would bind them, and under it there would usually be a saleable interest from which sometimes a mortgagee might obtain satisfaction, without injury to the purchaser, the mortgagor or any other person, although a third person might have an interest in the land sold.

Most of the remarks that have been made concerning a decree in equity for sale, apply to an order for sale made at law under the Act of 1791. The difference between the two Courts, in reference to this subject, is in practice not in principles. Notwithstanding the fullest exertion by the law Court of all its power under the Act, there would be cases where adequate relief could be had only in equity; other cases might suggest a wish that the rules of the law Court were better adapted for applying on all suitable occasions, the new remedy which the framers of the Act seem to have thought so valuable. But even if the practice now prevailing under existing rules be taken as an exposition of the Act, an order of sale would have at least the same effect as a decree between mortgagee and mortgagor; it would be conclusive of all rights subsequent to the date of the mortgage under an extreme opinion as to the efficacy of registry:

Mitchell vs. Bogan.

under a contrary opinion, it would be subject to the rights of persons who were not parties or privies; it would be rarely unproductive to the mortgagee, never absolutely nugatory.

What has been said must have already suggested the reflection that the distinction between cases founded upon the circumstance of the mortgagor's being out of possession, does not correspond with the other distinction between cases where complete justice cannot be done by proceedings between mortgagee and mortgagor, and those where it can be. Why should the case of a vacant possession differ from one of actual occupancy by the mortgagor? No third person may be concerned in either, and title gives legal possession. Why should a tenant at will, or tenant for a year, or other temporary occupant holding under the mortgagor, deprive the law Court of jurisdiction, and divest the mortgagor of his legal title?(a) A purchaser and everybody else may know that no opposing right will be set up, or if it should be, that it would be easily overcome. If every *terre-tenant* shall be presumed to have an opposing right, does the rule embrace an overseer of the mortgagor upon a plantation on which the mortgagor does not himself reside? If the existence of right in a third person renders the case unfit for a law Court, what principle is there which makes such existence less influential when it is clearly proved by other evidence, than when it is presumed from possession? A mortgagor may be out of possession (in the sense attributed to that phrase in *Stoney vs. Shultz*,) and yet a purchaser be willing to give the full price of the land for a title to it, made by the conjoint authority of mortgagee and mortgagor. More than that, a mortgagor may remain constantly in actual occupancy, and yet important rights in the land subsist in third persons. Take the case of a second mortgagee or of a vendee of the mortgagor by whose permission the mortgagor continues in possession. Both of these cases would be con-

(a) 2 McC. 146.

Columbia, November and December, 1857.

sidered as coming within the Act, and in both, the Court of Common Pleas, according to its present practice, would order a sale; yet in both there are rights of a third person, which equity would not conclude without a hearing.

In referenc to Judge NOTT's remarks made in *Durand vs. Isaacs*, it is easy to see that the law Court would make no nugatory order for the sale of "a man's property who was not before the Court," but would order the sale of the interest which was mortgaged: and if that man's property is subject to this interest, the purchaser would acquire some superiority. The man in possession, even if he bought *bona fide* without knowledge of the mortgage would after the sale be in a condition similar (not worse, probably better,) to that of one whose land without actual notice to him had been sold under a judgment that had lien on it when he bought it; the purchaser under the order for sale would, against every right of a third person derived from the mortgagor, have much better chance of indemnity, than he would have had against a defect in the debtor's title, if he had purchased land under a *feri facias*.

So as to the purchaser's acquiring merely a right to bring a possessory action for the land, it may be observed that in no case could a purchaser under an order for sale made in the Common Pleas, if resisted, come to enjoyment without an action. He would be obliged to bring possessory action against a mortgagor himself, who refused to yield possession, even where no right of a third person was pretended, unless perhaps the Court of Law, altering its rules, should do what it never yet has done, give to him such order and process for enforcing the delivery of possession as a Court of Equity will in a proper case give after a decree for sale.^(a) The right to bring and to maintain a possessory action is often the first fruit of a title the most perfect.

When it was said that the purchaser would acquire nothing more than a right to bring a possessory action for the land,

(a) *Blake vs. Scriven*, 2 Hill, 312.

Mitchell vs. Bogan.

"which is still reserved to the mortgagor by the Act," I think there must have been some inadvertence. If the case was a proper one for the action of the Court, and the order was made against the mortgagor, defendant in the suit, it would bind him, and it cannot surely have been meant that in that case the land would, after sale, be still reserved to him by the Act. If a third person's being in possession rendered the case unsuitable for the Court, then the argument was, that the Act did not apply to it at all, and consequently the land was the mortgagee's. Has *mortgagor* been misprinted for *mortgagee*? The land is never reserved to the mortgagee by the Act; if by reason of the inapplicability of the Act the case, the legal title was in the mortgagee, a sale under proceedings between him and the mortgagor would amount to a sale made by his agent, and the purchaser would acquire at least his estate—the legal title subject to redemption by a third person who had the mortgagor's equity. Was *mortgagor* used to include all persons who had the mortgagor's right, and by *land* was the equity of redemption meant, as reserved? That is not reserved by the Act. Or was it the right to bring a possessory action and not the land or the equity, which was meant as reserved, and as reserved to the mortgagee? This is not given by the Act, and would pass to the purchaser with the legal estate.

I am persuaded that no division of cases between law and equity, founded on the circumstance of the mortgagor's being out of possession, was ever thought of in the framing of the Act of 1791, and that no respect for the rights of either of the original parties to a mortgage, or of a purchaser at a sale for satisfaction, or of any third person, could have suggested an exception from the Act of all cases where that circumstance, as it has been understood, should be found to exist.

What then was meant by the exception, "when the mortgagor shall be out of possession?" With less confidence than

Columbia, November and December, 1857.

I feel in rejecting the construction heretofore given, I venture to offer another.

I think that the exception was meant either to refer exclusively to a state of things existing at the ratification of the Act, or to such present and future extinction of the mortgagor's rights as rendered inappropriate the ownership in him which was enacted as the general rule. There is doubt, therefore weakness, shown by two explanations of that which has but one meaning; yet I exhibit this weakness, because the subject admits of no absolute certainty. These two explanations are closely allied, one or the other may meet with favor, according to the preconceptions of different persons, and both are free from such decided objections as I have urged against that which has been adopted. Both are very simple, and they may have been overlooked on that account.

Before the Act, the circumstance of the mortgagor being out of possession was not unknown to the law of mortgage, and although the penman of the Act was neither a careful writer, nor probably a well drilled practitioner of the law, I conceive that he was a man of liberal views and general information. He may be, upon good reasons, presumed to have understood that the statute of limitations would not run against the mortgagor's equity of redemption, so long as any portion of the land remained in the possession of the mortgagor or his heir, but would run when the mortgagor was out of possession; (a) and further, that possession is actual or legal—in deed or in law—and may be held by title only where there is no opposing occupancy, or by agent or lessee; so that the statute would not run against the equity of redemption so long as any portion of the land was held by any person claiming for or under the mortgagor. Having a general knowledge of the pre-existing law, the legislator turned the mortgagor's equity into a legal estate, and left to

(a) Powell on Mort. 427; Sel. Ch. Ca. 55; 3 Atk. 225.

Mitchell vs. Bogan.

the mortgagee only a right to obtain satisfaction by sale of the land: and when naturally he desired to guard against any mischievous operation of these changes, no expedient was so likely to occur to him, according to the usual course of parliamentary composition, as a "provided always, that nothing herein contained." How far shall the state of things now existing be disturbed? may have been asked. The answer, it may well be supposed, would have been of this kind: "Suits already commenced by the mortgagee for the land (perhaps, too, suits for the mortgage debt) shall not be affected—inducements heretofore held out to foreign creditors shall be unaltered, no person shall be deprived of any right that he now has. Right, however, is different from remedy; it does not include the mortgagee's legal capacity to take the profits or sue for the land, or any other privilege which is merely remedial; the real rights are, on one hand, to the money, and on the other to have the land after payment.(a) If this is not so, why say any thing about suits pending, (whether for land or money;) present rights, in their large sense, would cover all; and if the Act is not to extend to any mortgage now existing, of course it cannot extend to any suit heretofore brought by the mortgagee." When, as I suppose, with this understanding of rights, pending suits were excepted, possessory actions already terminated by judgment or by delivery of possession to the mortgagee, would naturally have been thought of. Shall the mortgagor be owner of the land in these cases? "Surely not; nor in cases where the mortgagee has entered upon land never occupied by the mortgagor, or land from which the the mortgagor has voluntarily withdrawn or been rejected. In all such cases the mortgagor must rely, as heretofore, upon his equity of redemption." Such cases would all be cases where the mortgagee's possessory right had already been exerted, and would

(a) *McM. Eq.* 13.

Columbia, November and December, 1857.

all be included under the phrase, "the mortgagor out of possession;" giving to the word *possession* its largest signification, and under the word *mortgagor*, including here, as in other parts of the Act, every person claiming under the mortgagor. With the meaning and purposes which I have thus indicated, I suppose the penman of the Act to have drawn the proviso. He awkwardly used first the term *now*, and soon afterwards the words "at the time of passing this Act:" and as, I think, with some vague conception of a future being referred to by the latter form of expression, and probably with a remembrance of the "shall or may," so common in legislative language, he wrote "mortgagor *shall* be out of possession," when he meant *may be out*, or *is out*. This is an inaccuracy not greater than the Act exhibits in other instances that have been pointed out; and it seems to me strange that an important distinction, amounting to a repeal of the Act in almost half of the cases embraced by its other words, should by ingenious speculations, be built upon the use of one auxiliary verb rather than another by a slovenly writer. A slight confirmation of the meaning which this explanation gives to the exception, may be drawn from the close connection of the first two clauses of the proviso, shown by the conjunction *or*, whilst between them and the others, and between the other two, the disjunctive *nor* is used, (inaccurately, as the sentence is formed.) It is as if the writer had said, *this matter shall not extend to either of these two, nor to that, nor to that*.

It may be, however, that present rights, as a general phrase, did include the superfluous particulars of pending suits before mentioned, and that the Act was not expected to embrace pre-existing mortgages. I ought to think so, for so it appeared as a plain matter of course to Chancellor Harper's discriminating mind. (*Drayton v. Marshall*, Rice Eq. 388.) What then did "when the mortgagor shall be out of possession" mean? Something future; but it may be something which will appear plain to those who adopt the signification

Mitchell vs. Bogan.

of *possession* and *mortgagor* before given. The Act of 1797, removed doubts about what it calls the release of the equity of redemption; but it cannot be reasonably imputed to the framer of the Act of 1791, that he intended to enact, that a conjunction of the rights of mortgagor and mortgagee in the latter should not make him owner of all that pertained to both. It could not have been intended to extend the rule that "the mortgagor shall be deemed owner of the land" to cases of such conjunction, either before or after the passing of the Act, effected by release, conveyance or other means. All such cases may well have been considered as coming under the phrase "mortgagor out of possession:" that is where neither legal nor actual possession would be in the mortgagor or any person deriving right from him. All conceivable transfers to the mortgagee, or his representative, by the mortgagor or his representative of the rights which the mortgagor had immediately after the execution of the mortgage, ought of course to have been excepted from the general rule of ownership which was enacted: no other words in the Act except them, and they may all come under the words, "when the mortgagor shall be out of possession."

It will be seen that I consider the question, whether the proviso extended to the first section of the Act as well as to the second, unimportant. I conceive that it imposed restrictions upon the general rule enacted in the second, and that to cases out of the general rule the remedy given by the first was not expected to apply, and would be ill-adapted.

To paraphrase the second section so as to express my sense of its meaning, I would write it thus, giving to *mortgagor* and *mortgagee* the signification before explained:

The mortgage shall be deemed a mere security for the debt intended to be secured by it; and the mortgagor shall be deemed owner of the mortgaged land, until it may be sold for satisfaction of the mortgage debt. The mortgagee shall be entitled to obtain satisfaction out of the land by sale, but shall not be entitled to

Columbia, November and December, 1857.

maintain any possessory action for the land, even after breach of the condition specified in the mortgage. Provided that nothing herein contained, introductory of change, shall extend to actions now pending, or to cases where the mortgagor's right of possession shall have ceased, or to an ordinance, &c., or to any rights now existing.

These remarks have been prolonged far beyond what I expected when I began. I fear that this case will induce still wider departure from the simple rule that the Legislature intended to establish. I think that I foresee the irregularities, the shifting and uncertainty of titles, the defeat of liens, and the confusion that will ensue if the distinction shall long continue to prevail, which has grown out of the first consideration that was had of a few enigmatical words in a Statute. Therefore I have expressed my strong convictions of error adopted at the start, which is necessarily progressive, and at every step must go farther astray. If the error is only in myself, my efforts can do no harm: but if by them others should be incited to the discovery of the truth, a mischievous course of decision may be arrested. It is usually wise to adhere to what is settled, even when its propriety is doubted: but sometimes it is better to correct an error, than to persist in working out, by logical deduction, all the evil consequences to which it may lead.

WHITNER, J. I concur in the views here presented.

Motion dismissed.

Union Bank vs. Hodges and Smith.

The following dissenting opinion of WARDLAW, J., was not filed in time to be inserted with the case as reported at page 480 of this volume.

UNION BANK (OF GEORGIA), vs. HODGES & SMITH.

WARDLAW, J. The three defendants pleaded that on the same note which, in this action, the plaintiff alleges to have been made jointly by them, the plaintiff had a former recovery against two of them, under an allegation that it was made by those two. The plea concluded with a common verification. The plaintiff replied that the former recovery without satisfaction, was no bar to this action: that is, in effect he demurred to the plea. He might have replied that Robert Smith was a dormant partner with the other two, undiscovered by the plaintiff until the commencement of this suit, and that the other two defendants are insolvent, and the plaintiff has yet had no satisfaction. To this the defendants, although they might have traversed some of this new matter, would probably have demurred, thereby bringing to argument the sufficiency of the plea, even when the new facts stated in the replication were admitted.

The case has been argued with the concession to the plaintiff of every advantage, which any pleading, by way either of replication or new assignment, could give him; and however the pleadings subsequent to the plea may be framed, it must, if the facts be such as the plaintiff states, present at last this question: Does a judgment on a joint simple contract obtained against two of three joint contractors, without satisfaction, bar an action against the three on the same contract?

I say *on the same contract*, and here meet the second ground of appeal, which speaks of other counts in the declaration besides the one on the note. If the plea of former recovery concluded with a verification *by record*, and that was proper,

Columbia, November and December, 1858.

prima facie the contract would be taken to be the same, when no new assignment had been made. If the conclusion of the plea by a *common verification* was held proper, (on the ground that the identity of the promises which in the former action were alleged to have been made by two, with the promises alleged to have been made in this action by three, is a fact for the jury,) then the plaintiff having shown no promises besides that contained in the note, (which is admitted to be the same in both actions,) can derive no assistance from his money counts. It is true that the original consideration, if there was any, might not have been extinguished by the note, and it is true that a note is evidence to sustain a count for money had and received against the maker: but where no consideration for the note has been shown, and the note itself is extinguished, all counts must fail which rely only upon the note for support.

Returning then to the question which I have stated, I proceed to set forth some grounds for the opinion that the former judgment is a bar to this action, which I gave hastily on the circuit, and have since had opportunity carefully to re-examine. The grounds may all be resolved into submission to high authority; for the argument of the question has been exhausted by the repeated discussions which have been had of it. Our own cases, and some from North Carolina, which have been cited for the plaintiff, have not been elsewhere noticed, and I will endeavor to see whether they can be made to resist the array which the defendants present.

In Collyer's Treatise on Partnership, Edition of 1848, by J. C. Perkins, book 3, ch. 6, sect. 7, § 755-7, page 657, and notes 1, 2, 3, may be found a reference to most of the cases on the question in hand, and a valuable analysis of them. For the convenience of those who may choose to refer to the cases, I here bring together in support of the opinion that the former judgment is a bar, the following express decisions, which have been made by eminent judges, and are sustained by arguments that appear to me unanswerable.

 Union Bank vs. Hodges and Smith.

IN ENGLAND: *King vs. Hoare*, 18 Meea. & Wels. 494, where Baron PARKE, by comparison of the reports Cro. Jac. 74, and Yelv. 67, reconciles Chief Justice POPHAM's opinion in *Brown vs. Wooten*, with the distinction between a joint and a joint and several obligation; and carries forward the views of BAYLEY, B., in *Lichmere vs. Fletcher*, 1 Crompt. & Meea. 634, so as to show that if the former judgment is not a bar, an exception is made to the general rule that a joint contract discharged as to one, by an act of the promisee, is discharged as to all (*Nedham's case*, 8 Rep. 136*); and the legal effect, which a judgment may have upon one, is made to depend on contingencies affected by the will of another. IN MASSACHUSETTS, *Ward vs. Johnson*, 13 Mass. 148; *Gibbs vs. Bryant*, 1 Pick. 121. IN NEW YORK, *Pearce vs. Kearney*, 5 Hill, 86; *Moss vs. McCulloch*, 5 Hill, 184; *Robertson vs. Smith*, 18 John. 450; *Peters vs. Sandford, et al.* 1 Denio, 224; *Perry vs. Martin*, 4 John. Ch. Ca. 566. IN PENNSYLVANIA, *Smith vs. Black*, 9 Serg. & Rawle, 142; *Anderson vs. Levan*, 1 Serg. & Rawle, 384. IN MARYLAND, *Moale vs. Hellins*, 11 Gill, & John. 11. IN UNITED STATES CIRCUIT COURTS, *Grafton vs. United States*, 3 Story's C. C. 651, (where Judge Story's opinion is pronounced with express reference to the case of *Shebey vs. Mandeville*, 6 Cranch, 253-4, and *Willings vs. Consequa*, Pet. C. C. R. 306, decided by Judge WASHINGTON.

Add the opinions of Judge GREER, *United States vs. Price*, 9 How. 93, of Judge RUFFIN, *Shear vs. Gillet*, 1 Dev. Eq. 466, and of Judge BALDWIN, 2 Rob. 559, and one might be led to suppose that if decisions in this State look the other way, decisions elsewhere are conflicting, or some special legislation controls the Courts here. In some of the United States there is special legislation affecting the question, such as an enactment that partnership liability shall be joint and several, or that upon joint contracts suits may be brought against some not all of the contractors; but in this State the question is altogether one of common law unaffected by any

Columbia, November and December, 1858.

peculiarity of regulation or practice, and if our decisions oppose great authorities, they must, if they would command the assent of a learned fraternity, invoke authorities equally plain and strong, or rest upon reasons which were not properly estimated in the cases that have been cited.

Against the English case of *King vs. Hoare*, it was urged, in argument here, that it recognizes the same rule as to joint trespassers, which it establishes as to joint contractors; whilst with us it is well settled, that a recovery against one joint trespasser (distinguished from a joint tortfeasor in trover, *Bogan vs. Wilburne*, 1 Spear, 182,) does not without satisfaction, bar an action against another; *Smith vs. Singleton*, 2 McM. 184. In answer, it must be admitted that we departed at a very early period (*White vs. McNeely*, 1784, 1 Bay, 11,) from the English practice as to joint trespassers; so did the Courts of New York, (*Livingston vs. Bishop*, 1 John. R. 289 :) but neither here nor in New York, is any departure as to joint contractors professed, and the reasons which urged to it in cases of trespass, do not apply to those of contract.

On the side of the defendants familiar propositions conduct to a conclusion.

Where two or more persons were bound by an obligation, and one of them has been released by a voluntary act of the obligee, all are released; and this, whether the obligation was joint and several, or only joint, and whether the act of the obligee was done with the express intention of releasing, or was only such as has the legal effect of releasing, like the obligee's marrying one of the obligors, or appointing one of them his executor.

Taking a higher security extinguishes the right of action on a lower one for the same debt. A joint judgment against all the obligors, on a bond, bars further remedy on the bond; a separate judgment against one of two or more joint and several obligors, does not extinguish the bond as to any other one, for it does not bar the remedy by a separate action

Union Bank vs. Hodges and Smith.

against that other. A separate judgment against one of two joint obligors may not *extinguish* the obligation as to the other, but it bars the remedy against him; if sued separately, he may plead in abatement the non-joinder of his co-obligor, or in bar the former judgment, (see *King vs. Hoare*.): and if the two be sued together, the former recovery may be pleaded in bar. It is in bar and not in abatement, because no better writ can be given, as it should be by a plea in abatement, and because a joint recovery cannot be had, inasmuch as the right of action against one has been already enjoyed. More plainly, a recovery against two of three joint obligors must bar an action against the three, for such recovery cuts off all chance for the plaintiff to urge, (as might sometimes be done when only one was at first sued,) that the former recovery was on a several and not on a joint obligation. A contract is between parties: a *party* like an artificial person may be sole or aggregate. An obligation joint and several has a double aspect; when viewed as several, it is the same as several distinct obligations of distinct obligors, separate securities for the same debt, or separate contracts upon which there may be separate judgments although only one satisfaction: but upon a contract only joint, there can be only *one* judgment, as there can upon the same contract, be only one recovery against the same party. The plaintiff has by his first recovery shown that there was but one contract, and that upon that the *party* was the person or persons whom he sued; he cannot afterwards contradict his recovery, by saying in another suit, that the party was differently composed; more certainly, he cannot recover a second time against the same persons that are already subject to execution.

The reason for making a recovery against others a defence for him, whose obligation may be said not to be *extinguished*, is thus seen to be technical; but still the defence is founded on principles of justice equal to those which require a plaintiff in suing upon a joint and several obligation, to treat it

Columbia, November and December, 1858.

either as wholly joint by suing all together, or as wholly several by suing each separately, and not as mixed by suing more than one but not all.

For the plaintiff it has been urged in argument here, that contracts by partners are joint and several. Lord Mansfield, in *Rice v. Shute*, (5 Burr. 2618,) said that "all contracts with partners are joint and several;" but he added, "every partner is liable to pay the whole," and this shows the effect which at law results from the *several* nature of a partnership contract. In actions *ex contractu* against partners, the omission of a person who might have been made a co-defendant, is not ground of nonsuit, but can be taken advantage of only by plea in abatement, unless on the face of the declaration or some other pleading of the plaintiff, it appears that the person omitted contracted jointly with those who are made defendants, and is still living. Those who are sued are held to the consequences of a waiver of objection, when they fail to plead the omission of a co-contractor. Mutuality requires that the plaintiff, too, should be held to the consequences of his omission. He should not have judgment against two that he chose to sue in the first action, and again another judgment on the same contract against the same two and a third, or another separate judgment against the third, who, (as he before said) was not a contractor. If he should say, that the liability of the third was before unknown to him, it would appear that his recovery had been had against the persons to whom he gave credit, or with whom he had actually dealt; and that by his own act he had put himself into a situation in which he could not properly ask a reconsideration as to either them or anybody else. As to the case in hand, it may be observed, that, if an unknown dormant partner would at all avail for the plaintiff, the pleadings and proof should on a new trial be different from those that are now presented.

The plaintiff has also endeavored to force into his service expressions, which have been used in cases in equity, expla-

Union Bank *vs.* Hodges and Smith.

natory of the principles upon which in equity the creditor of a partnership is permitted to obtain payment of his debt out of the assets of a deceased partner, whilst at law upon the death of a partner, the legal remedies against him, in respect of partnership contracts, are extinguished, and the creditor, being precluded from suing the representatives of the deceased, can maintain an action against the surviving partner only. In *Devaynes v. Noble*, (1 Mer. 529, 563,) Sir William Grant finds a reason for the distinction made in equity between partnership contracts and other joint contracts, in his apprehension that "by the general mercantile law a partnership contract is several as well as joint;" but he plainly affirms that the common law "with regard to partnership contracts applies its own peculiar rule, and because they are in form joint, holds them to produce only a joint obligation, whose consequences attach exclusively upon the survivor." Sir John Leach, in *Wilkinson v. Henderson*, (1 Myl. & K. 532,) declares "that all the authorities establish that in the consideration of a Court of Equity, a partnership debt is several as well as joint;" but the very interference of a Court of Equity implies the acknowledgment, which all the cases on the subject express, that at law the obligation of partners is only joint.

The rules concerning the admissibility of judgments in evidence have also been appealed to. It is said that the defendant who was not before sued, cannot now plead or produce the judgment to which he was not a party; indeed, that none of the defendants can do so; for the parties are not the same in the two cases, and a plea bad for one defendant is bad for all. In this the distinction is overlooked, which subsists between offering a judgment for the purpose of proving the truth of the matter adjudged and of facts therein involved, and offering it for the purpose of proving its own existence and the legal consequences thence deducible. For the latter purpose the record of a judgment is admissible between

Columbia, November and December, 1858.

strangers, and is often the only competent evidence, as daily instances in our practice show. The defendants here do not plead or desire to show, that by the former recovery the making of the note as therein alleged, or the damages which resulted to the plaintiff from nonpayment of it, have been undeniably established: but they adduce the former judgment only to show that there is such a judgment, which upon a certain note, whether forged or genuine, and under certain allegations correct or incorrect, was rendered against two of these defendants as joint contractors; and from this they wish to deduce the legal consequence that, (the identity of the note having been established,) the plaintiff is, without further inquiry about the note, precluded from recovering on it against the same two, or against them and a third now alleged to have been also a joint contractor.

The plaintiff's great authority is *Sheehy v. Mandeville and Jamesson*, (6 Cranch, 253.) Upon that alone rest all the cases in this State and elsewhere, which although falling short, as that does, of what is now held, have carried this Court to the present decision. That case has given occasion for many explanations, excuses and strictures, which may be seen in the cases before cited; but no exposition of it has maintained its sufficiency to establish what has now been inferred from it. Perhaps, in no view that could be taken of it, would all its observation and argument appear correct, even if its ruling should be approved. The reputation of Chief Justice MARSHALL can safely endure proof of his fallibility, and the slight inaccuracies of the great sometimes lead to serious errors. The Chief Justice seems himself to have attributed great importance to the form of the plea filed in that case by Mandeville; for he expressed doubt as to what would have been the fate of the plea on general demurrer, whilst he held it bad on special demurrer. Commentators have suggested that that case may be reconciled with others, by attention to the circumstance that there the note of Jamesson was in fact, as it

Union Bank vs. Hodges and Smith.

was in form, the separate note of one partner, and that it was taken as collateral security for the partnership contract, so that the joint contract was not by a judgment on it extinguished as to any of the joint contractors, (9 How. 93 ; 2 Rob. 559 ; 2 Greenl. Rep. 193.) An obstacle in this view is that, according to the admission contained in the demurrer, it was held that the original contract had been discharged by the note received in payment. The substituted contract expressed in the note was that on which Mandeville was held liable, and that upon which recovery had before been had against Jamesson. If the first action was "instituted upon the *assumpsit* of Jamesson individually," and the second action against Mandeville, or against the two, was proper, then the note must have been in the first case several, and in the second case joint. This shifting signification of the words, "I promise" may be a just consequence of an individual's giving a note in his own name with concealment of a partner who is also liable on the consideration of the note : but upon an ordinary joint and several note made by more than two, when recovery has been had in a separate action against one maker, other makers may be sued each in a separate action, but cannot be joined in one action ; and upon such note made by two, after recovery in a separate action against one, the other may be made liable upon his separate promise, but not on the joint promise. A peculiar instrument, at one time exclusively several, and at another time exclusively joint, is necessary to meet the pleadings in the case of *Sheehy v. Mandeville and Jamesson*, and the remarks which were made concerning the previous case of *Sheehy v. Jamesson*.

The question as to the effect of a judgment against one of several joint obligors, when the original declaration was on a joint covenant, (contract,) was thought by Judge Marshall not to arise in the case he was considering, "in which the declaration in the first suit was on a sole contract;" and the question as to the sufficiency of a plea, in which both de-

Columbia, November and December, 1858.

fendants should join, was thought not to be presented, when the plea was only by the defendant who had not been before sued. The manner in which the case was extricated from these questions, and what was said about the form of the demurrer, indicate that a want of confidence was felt in either of several grounds for the decision, which were hastily discussed, and any one of which, if sure, would have served; and show that Judge Marshall intended only to decide the case before him, narrowed and defined as he exhibited it. His sense of "real justice" probably prevented a closer scrutiny of the "technical rules of law;" his intimations of opinion on the questions, which he held not to be involved, are far from being clear; and what he professed to decide is no authority for decision of those questions against the present defendants, whose case necessarily involves them.

The case of *Collins vs. Lee & Lemastres*, 1 Bail. 348, is the earliest in the reports of this State which contains any discussion of the question now before us. There the President of a Court of three was absent, and by the two remaining members of the Court the order of a Circuit Judge, overruling the plaintiff's demurrer to the plea, was reversed. Of the two, JOHNSON, J., in a few pithy remarks, distinctly recognizes the proposition, that a judgment against one joint obligor is a bar to an action against another, as a modification or corollary of the larger rule, that an action will not lie against one of several joint obligors; but believing that the bar in favor of the obligor then for the first time sued, was only an incident of the protection, which might be claimed by the obligor against whom the former recovery had been had, and perceiving that the latter waived the protection, he thought that the former was not entitled to it. If both had joined in the plea, he must have considered it good. His opinion, then, is an authority for the defendants in this case.

The other member of the Court, COLCOCK, J., in pronouncing the leading opinion, uses expressions adverse to these

Union Bank vs. Hodges and Smith.

defendants on every point; but the case adjudged by him was one on bond against two defendants, of whom one, co-operating with the plaintiff and refusing to join in the plea, desired the former judgment to be set aside; ours is a case on note against three defendants alleged to be partners, all of whom resist the plaintiff, and have joined in the plea.

Special attention should be given to these matters in Judge COLCOCK'S opinion, viz.: If he had been compelled to say that the former judgment was a bar, he would still have been in favor of the plaintiff's motion on his second ground of appeal, for he says: "I should have no hesitation in setting aside the judgment when both parties to it request that it may be done." Every thing else that he said might then be regarded in the nature of *obiter dictum*; and *obiter dicta* are most frequent and dangerous when they are used to maintain propositions favoring a decision, yet not indispensable to it, for behind them is something stronger that would suffice if they should fail:—

He argues that a judgment can be a bar only as to the joint obligor before sued, and waives the examination of its effect even as to him, but can "discover no principle upon which it can be allowed to avail Lee (the one not before sued) when his co-defendant does not choose to set it up as a defence." The main argument might be erroneous, and yet the decision be sustained by this special circumstance:—

Because Lee was a *stranger* to the former judgment, he conceives that "certainly, however it cannot avail as a defence" for him:—

He is evidently disposed, if not restrained by authority, to overcome "mere technical reasoning unsupported by any sound principle of policy," and upon the question before him, which necessarily depended upon inferences from technical rules, no case besides those cited by Mr. Chitty (1 Ch. Pl. 29) was brought to his view:—

Respecting the case of *Brown vs. Wootton*, and the passage

Columbia, November and December, 1858.

in COM. DIGEST deduced from it, his observations lose their force, when the explanation of Baron Parke in *King vs. Hoare* has been seen :—

The distinction between an obligation only joint and one joint and several, so essential in every branch of this subject, he regards as immaterial ; thinking it sufficient that a judgment does not always extinguish the original debt :—

When in default of a plea in abatement there has been a recovery against some, not all, of joint contractors, he dwells upon the defendants in that action having “dispensed with the rule” that all joint contractors must be sued together, and having “permitted” a recovery against themselves ; but does not notice that the plaintiff chose to make an omission, and that the defendants, by waiving their right to object in the proper mode, only sanctioned the plaintiff’s act, which had made the case, as to him, just as it would have been if the defendants had really been the only contractors :—

The anomaly of two judgments upon the same contract against one person, he dismisses by treating that person’s risk of being made to pay the same debt twice “as ideal, or the result of his own neglect” :—

He thinks that the former recovery, which was involved in *Sheey vs. Mandehville*, was had on a joint liability, and that what was said in that case about the original *assumpsit* of Jamesson cannot affect the question.

When the opinion of Judge COLCOCK is carefully examined, it will not, as I conceive, be found an authority against these defendants, upon important points in this case, which were not involved in the one he was discussing.

The case of the *Treasurers vs. Bates*, 2 Bailey, 362, has also been pressed into the service of the plaintiff here. That case settled important questions in reference to the complicated liability of a Sheriff and his sureties, under the peculiar official bond which our Acts of Assembly then required. Incidentally and unnecessarily an opinion was expressed upon

Union Bank vs. Hodges and Smith.

the question now in hand. The purpose there was to show that the Sheriff's confession of a judgment in *assumpsit* against him for money received, was no bar to an action against him and his sureties, on their joint bond; but was admissible as evidence of his default. It was necessary only to establish (as was done on pages 380-1 of the report) that a confession of judgment is a solemn admission, and that all admissions of the principal bound himself and his sureties; and then (as is done on page 383) to show, that the two suits were not on the same cause of action; that the bond was a security against default, and that the previous establishment of the default showed the breach of its condition, and not its extinguishment. All that is said on page 382 about the effect of a former recovery against one of two or more joint contractors, was inapplicable to the case. Assuming that it was settled by *Sheehy vs. Mandeville*, and *Collins vs. Lee & Lemastres*, (the only two cases that seem to have been examined,) that the persons not before sued could not plead the former recovery in bar, the Judge who wrote the opinion was satisfied that the plea would not avail even the defendant against whom the recovery was had. The argument is, that as a recovery must be had on the joint contract, and in an action brought against all, if the plea were good for one it must be for all; it is settled that it cannot be good for all, therefore it is good for none. It will be seen that if it has not been settled that the plea is good for none, here is an opinion that it must be good for all. The concluding remark, "The judgment against one of several joint contractors is a nullity; it may be arrested at any time before execution," must have been made inadvertently. Cases before cited show, that where in an action against one or more, not all, of joint contractors, there is no plea in abatement, there cannot, for the plaintiff's omission of persons who should have been made defendants, be either nonsuit or demurrer, if the defect does not appear upon the plaintiff's pleadings; of

Columbia, November and December, 1858.

course there cannot then be arrest of judgment; and whilst the judgment subsists it cannot be treated as a nullity. Whether the Court should set the judgment aside, on the application of the plaintiff, or even of both parties, we are not, in the case before us, where the pleadings admit the existence of the judgment, required to decide:—Even if it should be set aside, the effect of that upon persons, not parties, whose condition was affected by the recovery, might depend upon nice distinctions between merger, extinguishment, and obstruction of remedy, as one or the other of these should be settled to have been the operation of the judgment whilst it subsisted, upon the liability of those persons. (See *Nichols vs. Augereau*, 2 Mills, (Penna.) 290; *Robinson vs. Smith*, 18 John. 459.)

Our case of *Watson, Crews & Co. vs. Owens & Co.* (1 Rich. 111,) is put upon the ground, that the note of Owens was not accepted in satisfaction, but was only collateral security, like the note of any third person. It can stand on no other ground; and in reference to that, as in it recovery was had on the original partnership contract and not on the note, it is advantageously distinguished from *Sheehy vs. Mandeville*. Reference in it is made to *Robertson vs. Wilkinson*, (3 Price, 538; 1 Exch. R. 44,) where it was held, that a creditor's acceptance of bills drawn by the ostensible partner with whom he dealt, was no discharge of an unknown dormant partner; but too literal an exposition is given to the words used by Baron Graham, when he said, "In general, a release of one partner is a release of all, but a party has always a right against a concealed partner of whom he has previously had no knowledge, as soon as he discovers him, unless that ignorance was his own fault, as if he had not used due diligence in finding him." It is true, that the acts of an ostensible partner during the concealment of the dormant one shall not discharge the liability of the latter to pay a partnership debt; and against a technical release under seal

Union Bank vs. Hodges and Smith.

obtained from a creditor by the ostensible partner for inadequate consideration, charges of fraud might be made; but whilst such release was operative, it would discharge all the partners. If a judgment operates a merger or extinguishment, it has, whilst it subsists, the same effect. The attempt to make an exception to the general rule concerning releases, made not by operation of law but by act of the creditor, was the very thing considered and rejected in *King vs. Hoare*. If a creditor has by a recovery merged or extinguished the simple contract of partners, he cannot resort to it for the purpose of enforcing a dormant partner's liability, any more than he could claim the proceeds of a payment made on his debt after he had assigned it in ignorance of a dormant partner. So long as the right to proceed upon the contract remains with the creditor, he may take advantage of the discovery of a dormant partner; but when that right has gone, it cannot be resumed at pleasure. The discovery would be fruitless after the contract had been barred by the Statute of Limitations; and so, after it has been in any other way barred. Even if the obligation of a dormant partner is neither merged nor extinguished, but the remedy against it is merely obstructed by a former recovery, the creditor's right to pursue a dormant partner, upon discovery of him, is the right to pursue according to the forms of law, not the right to surmount an obstruction, which, under the rules of pleading and practice, the plaintiff's act in bringing a suit has even unintentionally created.

Not one of the cases cited from North Carolina contains a decision in favor of the plaintiff. *Spear vs. Gillet*, 1 Dev. Eq., (an equity case, in which relief was refused to a creditor, who had in Virginia ignorantly taken the bond of one partner, and afterwards discovered a dormant partner,) there are the plain expression of Judge RUFFIN's opinion in favor of these defendants, and some doubtful remarks of Chief Justice HEN-

Columbia, November and December, 1858.

DERSON, in the course of which a joint obligation and one joint and several are confounded.

In *Horton vs. Child*, 4 Dev. Law, 460, Judge DANIEL, deciding nothing pertinent to this case, considers it to have been settled, that a bond given by one partner does not extinguish the original debt as to the other partners. In *Shuster v. Perkins*, 2 Jones, 217, the familiar doctrine is reaffirmed, that a judgment against one of the obligors on a joint and several bond, is no bar to an action against another obligor, and cannot in a joint action against all the obligors be pleaded as a former recovery against all.

In our State are two cases in regard to bonds given for partnership debts, that are worthy of attention now. In *Fleming, Ross & Co. vs. Van Lawhon & Co.* Dud., 360, a bond was executed by Lawhon, without the assent of his partner, and the name "V. A. Lawhon & Co." was signed. It was held that the plaintiffs could recover on the original contract for goods sold, upon one of two grounds; first, that the bond bound nobody; or, second, that it was mere collateral security—the original contract remaining of force in either view.

In the later case of *Jacobs vs. McBee & Alexander*, 2 McM. 348, the bond of Alexander was taken by a creditor, (in ignorance that McBee was a dormant partner,) and because the bond bound Alexander, and was taken in discharge of the debt, the simple contract of the partnership, (if one existed,) was held to have been extinguished.

Is a bond to have a stronger effect in merging or extinguishing a simple contract than a judgment? The absurdity would not be imputed to any Court, of holding that the same simple contract, which was merged or extinguished by a bond, was restored to efficiency by a judgment on that bond; yet it is hard to see where the difference is, between a judgment on a bond of two out of three partners given for a simple contract of the partnership, and a judgment against

Union Bank vs. Hodges and Smith.

the same two on the simple contract itself. The bond was good against two and only two; so the judgment is good against the two. Why should not the latter be considered *a fortiori*, both on grounds of principle and practice, as operative in favor of all the joint contractors, as the former?

I conclude that no case has been brought to the view of this Court, that decides against these defendants' several points, either of which held in their favor would protect them; and that the reasons in support of the opinion, which has been given by a majority of the Court, are not such as I can venture to act upon, when so many strong authorities are in direct opposition.

INDEX.

ABATEMENT.

Vide *Pleading*, 2, 3.

ACCOUNT CURRENT.

1. A factor will not be allowed to select one item from his account current and sue upon that alone. He should sue upon the whole account, and claim the balance due at the foot of it. *Walter vs. Richardson*..... 466
2. Where a factor's account current shows that on a certain day there was a balance in his hands due his principal, all previous charges against the principal are extinguished, and if there is a balance due the factor at the foot of the account, it must arise from subsequent transactions, and they constitute his cause of action..... *Ib.*

ACTION.

Vide *Account Current*. *Case*. *Easements*, 3. *Ordinary*.

ADMINISTRATION.

1. Trover by A against B for the conversion of a slave. It appeared that A. had been absent from the State for more than seven years unheard of; that thereupon letters of administration of his goods and chattels were granted; that his estate was distributed, and the slave allotted to a distributee, whose agent sold her to B:—*Held*, that plaintiff was entitled to recover, the supposed letters of administration being null and void. *Moore vs. Smith*... 569
2. Letters of administration on the estate of a living person are null and void *ab initio*—the application upon which they were granted, whether based upon positive testimony, or the presumption arising from an absence unheard of, of seven years,

being *coram non judice*, and no one claiming under the administrator can be protected against the title of the living owner. *Moore vs. Smith*..... 569

Vide *Executors and Administrators. Single Bill*, 5.

ADMINISTRATION BOND.

1. An action will not lie on an administration bond in behalf of a distributee, until a decree has been rendered in the Court of Ordinary or Court of Equity against the administrator; it is not sufficient to produce a decree rendered after the action was commenced. *Ordinary vs. Pettus*..... 543

AGENT.

Vide *Evidence*, 11, 12, 13. *Public Agents*.

APPEARANCE.

Vide *Practice*, 1.

ARREST OF JUDGMENT.

1. If a jury say, in their verdict, that they find upon certain counts, but their assessment shows that they had reference to other counts, the judgment will not, it seems, be arrested if the other counts are valid, although the counts upon which the verdict was expressly found should be declared insufficient. *Ryan vs. Copes*..... 217

ASSIGNMENT.

Vide *Chose in Action. Conflict of Laws*, 2. *Set-off*, 2, 3, 4.

ATTACHMENT.

Vide *Conflict of Laws*, 2.

BAIL BOND.

1. An action of debt lies in any District Court of the State, on a bail bond taken in the City Court of Charleston. *McMillan vs. Whitaker*..... 523

Vide *Escape*.

BAILMENT.

1. Defendant having hired a negro "to work on his farm," employed

him on a steamboat and he was drowned:—*Held*, that defendant was liable for the loss of the negro. *Richardson vs. Dingle*;..... 405

2. A physician who attends slaves at the request of the hirer, cannot sue the owner for his bill—there being no privity of contract between them—even though the owner agreed with the hirer that he would pay all physician's bills. *Peake vs. Scaife*.... 672
3. In such case the hirer should pay the bill, and he then would have the right, it seems, to resort to the owner upon their contract. *Ib.*
Vide *Salvage. Warehousemen.*

BASTARDY.

1. An indictment for bastardy, alleging that A. C. "is the father of the said bastard child:"—*Held*, bad, on motion in arrest of judgment. *State vs. Caspary*..... 356

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. An indorsee who takes the promissory note of a third person as collateral security for a precedent indebtedness, is a *bona fide* holder for value, and entitled to recover the amount of the note against the parties liable when he took it; and proof that he had as yet sustained no actual loss, and had not given credit for the note to his immediate debtor, is no defence to the action. *Bank vs. Chambers*..... 657
2. In an action on a promissory note the plaintiff is not required to show that it was given for value; that the law presumes, and the onus is on the defendant to show want of consideration. *Ib.*
3. The drawer of a promissory note is an incompetent witness for his accommodation indorser in an action against him—the drawer being liable to the accommodation indorser for the costs of the suit..... *Ib.*
4. Where one having possession of a promissory note payable to bearer, surreptitiously transfers it to a *bona fide* holder as collateral security for advances then made and thereafter to be made, such holder, having advanced the full amount of the note before notice, may recover the full amount from the drawer, although some of the advances were made after the note fell due. *Bancroft, Betts and Marshall vs. McKnight*... 663
- 5 The Planters' Bank of Fairfield has authority to discount bills, drawn in this State on New York, at the usual rates of exchange among merchants. *Bank vs. Bivingsville Cotton Manufacturing Company*..... 677

6. To charge the drawer of a bill of exchange, drawn in this State on New York, a discount of one per cent. a month, the bill having forty-five days to run, is not usury, unless it be shown that the amount charged exceeds the usual rate of exchange..... 677
Vide Money Paid by Mistake. Release. Single Bill, 2.

BOND.

1. A bond reciting amongst other things that the obligors were willing to indemnify and save harmless the obligee against future liabilities, followed by a condition to pay a certain sum of money in instalments, *held* to be a money bond, and not a bond to indemnify. *Ingram vs. Wilson*..... 461
Vide Single Bill.

CASE.

- B. agreed by parol to allow A. to erect a mill on his land and to reduce the agreement to writing:—*Held*, that A could not maintain an action on the case against B. for wrongfully refusing to reduce the contract to writing and obstructing him in the use of the mill. *Trammell vs. Trammell*..... 471
 2. For the wrongful removal of plank from a dam the action must be trespass and not case..... *Ib.*
Vide Damages, 1, 2, 5, 6.

CHOSE IN ACTION.

1. An instrument not under seal, by which A agreed in the event of a recovery in a pending action of trover, to pay B a certain proportion of the verdict, is not assignable under the Act of 1798. *Burkett vs. Moses*..... 432
Vide Set-off, 4.

COMMISSIONERS OF ROADS.

Vide Road Laws.

COMMON CARRIER.

Vide Warehousemen.

COMPENSATION.

1. Where the Legislature directs land to be taken for a highway or other public use, and provides a mode by which the damages

to the owner shall be estimated and compensation made, the party entering under the Act is not a wrong-doer, and the mode provided must be pursued. *Fuller vs. Eddings*..... 239

2. Where the owner of a plantation owned a private wharf which yielded him a considerable income, and the Legislature authorized a public wharf to be made near the private one, on the same plantation, and directed the appointment of commissioners to estimate the amount of compensation which should be made to the owner "for the value of the premises taken for public use, as well as for the damages generally to the same:"—*Held*, that the owner was not entitled to compensation for the damages he might sustain for the loss of income from his private wharf..... *Ib.*

COMPOUNDING FELONY.

Vide Single Bill, 8.

CONFESSION.

Vide Evidence, 20.

CONFESSION OF JUDGMENT.

Vide Partners, 1.

CONFLICT OF LAWS.

1. The right to sell, transfer, and dispose of, personal property, belongs to the person of the owner, and such sale, transfer, or disposition, if valid where the contract is executed and according to the *lex domicilii*, is valid wherever the property is. *Russell vs. Tunno, Pinckney & Co.*..... 303
2. A voluntary assignment of personal property by a foreign debtor for the benefit of creditors, executed abroad, if valid there and according to the *lex domicilii*, takes precedence over liens by attachment subsequently taken out in the Courts of this State—the property being here at the time both of the assignment and the service of the attachment..... *Ib.*

CONSIDERATION.

Vide Release. Single Bill, 1, 3, 4, 5, 7.

CONTINUANCE.

Vide Practice, 2.

CONTRACT.

1. A and B having agreed to exchange lands, A conveyed his to B, and B gave A bond to make titles. B sold the land which A had conveyed to him, and either sold or failed to identify the land he had bound himself to convey to A, and having got possession of his bond to make titles, kept it :— *Held*, that B's conduct amounted to a rescission of the contract, and that A might maintain *indebitatus assumpsit* against him for the value of the land A had conveyed to him, or for the money he had received for it. *Neal vs. Neal*.. 83
 2. Where necessaries are furnished the slaves of testator before probate of the will, at the instance and on the credit of a legatee, the executor after probate will not be liable for the necessaries upon any implied contract. *Wilson vs. Huggins*. 410
 3. Where the contract of sale gives the purchaser the option to return the slave and pay hire, if by a certain time he should not like her, the contract is conditional, and does not confer such complete title on the vendee as will enable him to maintain trover against the vendor for taking away the slave within the time. *Southern vs. Cunningham*..... 533
 4. B advertised a reward of three hundred dollars to be "paid for the apprehension and delivery to the jail of Kershaw District" of a slave charged with murder. A apprehended and delivered the slave to a magistrate of Kershaw, who delivered him to a constable, in whose custody he remained until he was tried a few days afterwards and acquitted. *Held*, that A not having complied with the condition to deliver the slave to the jail of Kershaw district, was not entitled to the reward. *Clanton vs. Young*..... 546
- Vide *Bailment*. *Fraud*, 1. *Necessaries*. *Pleading*, 1. *Public Agents*. *Salvage*.

CONVERSION.

Vide *Trover*, 3.

COSTS.

1. Where an executor or administrator may sue without mentioning his representative character he is liable for costs. *Carter vs. Estes*..... 363
- For a conversion after the death of the intestate, the administrator may sue in trover without naming himself administrator, and

INDEX.

747

he is therefore liable for costs even though he names himself administrator. *Carter vs. Estes*..... *Ib.*

COVENANT.

Vide Warranty, 4, 5, 6.

CRIMINAL LAW.

Vide Bastardy. Gates. Negro Stealing. Trading with Slave.

DAMAGES.

1. In an action on the case for obstructing a public way, vindictive or punitive damages, beyond the amount of the plaintiff's actual loss, may be given. *Windham vs. Rhame*..... 283
 2. In case against a Railroad Company for carrying off the plaintiff's slave the value of the slave is the highest measure of damages. *Josey vs. Wtl. and Man. Railroad Company*..... 399
 3. New trial granted for excessive damages..... *Ib.*
 4. By written contract, not under seal, S acknowledged himself to owe or to forfeit to B, one hundred dollars, "if there should be default made in the condition underwritten," which was that S should, by a certain day, put B in possession of a certain house and lot:—*Held*, that the one hundred dollars was a penalty and not liquidated damages. *Bearden vs. Smith* 554
 5. Where at the trial of an action on the case for obstructing a private right of way, the Judge charged the jury that they might give *consequential* damages: *Held*, that, if by *consequential* the Judge meant *special* damages, still defendant was not entitled to a new trial; it appearing that he could in no way have been injured by the charge, there being no allegation or proof before the jury of such damages, and the verdict being under the circumstances not too high. *Zeigler vs. Braddy* 557
 6. Vindictive or punitive damages may be given in an action on the case for obstructing a right of way. *Jefcoat vs. Knotts & Redmund*..... 649
- Vide Compensation. Husband and Wife*, 3. *Mayhem. Railroads. Trover.*

DEATH.

Vide Evidence.

DECREE.

Vide *Administration Bond*.

DEED.

Vide *Mortgage*, 3.

DELIVERY.

Vide *Mortgage*, 3.

DISCOUNT.

Vide *Set-off*.

DOWER.

1. Where one has possession under titles derived from demandant's husband, he is estopped, it seems, from showing that the husband's title was bad where it was more than twenty years old and had never been questioned. *Douglass vs. Dickson*..... 417
2. If the husband acquire title beneficially and for his own use, the right of dower attaches, although his seisin be but for an instant, as where he immediately conveys to another..... *Id.*

EASEMENTS.

1. Where one backs water by his mill-dam on another's land, the use, if long continued, should, it seems, be considered adverse, in the absence of proof that it was permissive. *Chalk vs. McAlilly* 153
2. *Garrett vs. McKie*, 1 Rich. 444, as understood by the Court, approved..... *Id.*
3. Backing water within the channel of a stream, from which no appreciable damage results to the owner, is not of itself a legal injury which will sustain an action..... *Id.*
4. A grant of "the use of the timber" on the grantor's land, confers only an incorporeal right to use the timber; it is no conveyance of the title to the timber itself or the soil on which it grows. *Clark vs. Way*..... 621
5. Trespass *quare clausum fregit* will not lie for injury done to an incorporeal right..... *Id.*

ESCAPE.

1. Where a sheriff having a debtor under arrest on bail process discharges him on a bail bond which proves to be a forgery as to the signature of the bail, such discharge is a voluntary escape, although the sheriff was ignorant, at the time of the discharge, of the forgery. *Conyers vs. Rhame*..... 60

ESTOPPEL.

Vide Trespass to try Title, 1, 2, 5, 6.

EVIDENCE.

1. What is sufficient proof of loss of an original deed in order that secondary evidence of its contents may be given. *Berry vs. Jourdan*..... 67
2. A witness may, it seems, be allowed to refresh his memory as to the contents of a paper, by reading that which purports to be a copy, though it was not made by himself, provided that after reading it, he can speak to the facts from his own recollection. *Ib.*
3. A witness who had heard a deed read nineteen or twenty years before the trial, and had not seen it or a copy since, swore to the contents, (the deed having been lost,) and his testimony was strongly corroborated by other evidence in the cause: *Held*, that this was sufficient evidence to sustain a verdict supporting the deed..... *Ib.*
4. Where S, one of two members of a firm engaged in the manufacture of carts, agreed with defendants to make and deliver to them a number of carts, which the firm afterwards made and delivered: *held*, upon the evidence, that the contract was not made with the firm, that S alone could sue upon it, and that G, the other member of the firm, was a competent witness for S, he, G, testifying that the firm had declined the contract, that it looked to S alone for payment, and that he, S, had paid G his share by giving him his promissory note. *Sloan vs. Bangs & Co*..... 97
5. The declarations of a person in possession of lands, made during his possession and before controversy, are admissible to show that his possession was not adverse:—and the want of adverse character in the possession, both prevents his acquisition of title under the statute of limitations and rebuts presumptions of title, which lapse of time might have raised in his favor. *Leger vs. Doyle*..... 109

6. Where a party relies, under the Act of 1843, upon an office copy of a conveyance of land, which copy is without seal, he is not concluded by the Register's book, but may show that the original had a seal, which the clerk omitted to copy. *Sams vs. Shield*..... 182
7. An entry in a merchant's book is not evidence of a demand against his customer for forfeiture in supplying wheat according to special contract. *McPherson vs. Neuffer & Hendrix*..... 267
8. Where the subscribing witness to an instrument is dead or beyond the jurisdiction of the Court, mere proof of his handwriting is insufficient to authorize the sending of the instrument to the jury. *Russell v. Tunno, Pinckney & Co*..... 303
9. The subscribing witnesses to an assignment were R. & M. both of whom were absent from the State. R, examined by commission, testified, that he remembered nothing about the transaction; he recognized his own signature and believed the name of M to be his signature, but did not know the assignor. The signature of M. was otherwise proved :—*Held*, that the proof of the assignment was insufficient..... *Ib.*
10. Where, shortly after a vessel sailed, a violent storm arose and prevailed along the coast:—*Held*, that after the lapse of three years without any tidings of the vessel or any on board, the death of the captain during the storm might be presumed. *Gibbes vs. Vincent*..... 523
11. The declarations of an agent must be contemporaneous with the act done, or they are inadmissible as evidence. *Raiford vs. French*..... 367
12. B's wife was the daughter of A, and A's wife carried to B's house a negro boy, where she left him, and he remained in B's possession near three years. In trover by A against B for the conversion of the negro boy, the declarations of A's wife, when carrying the negro boy to B's house, were *held* inadmissible as evidence against B, to rebut the presumption of a gift arising from his possession..... *Ib.*
13. The declarations of B's wife made several months after his possession commenced, also *held* inadmissible against him..... *Ib.*
14. In case against a Railroad Company, for carrying off plaintiff's slave without his knowledge or consent, mere proof of transportation is itself sufficient evidence of negligence to throw the onus on the defendants. *Josey vs. Railroad Company*.... 399
15. Where a witness is interested and a release will make him competent, such release must be given, and a bond of indemnity from a third person will not answer the purpose..... *Ib.*

16. A party objecting to the competency of a witness on the ground of interest must make it clearly appear that he has a certain direct and immediate interest in the event of the cause itself. If his interest be doubtful, the objection goes to his credit and not to his competency. *Richardson vs. Dingle*..... 405
 17. The terms upon which a negro was hired, may be shown by parol, although it appears that a promissory note was given for the amount of the hire..... *Ib.*
 18. To prove loss of a deed executed fifteen years before the trial, it was shown that it was delivered to the grantor at the door of the clerk's office to be recorded; that it had never been recorded, and was not in the clerk's office; that the grantor had afterwards conveyed the land to defendant, and had removed from the State: *Held*, that the evidence was sufficient to let in secondary evidence of the existence and contents. *Edwards vs. Edwards*..... 537
 19. The question of loss was submitted to the jury: *Held*, that their verdict for plaintiff, establishing the loss, must be considered as having removed all doubt..... *Ib.*
 20. Confessions of prisoners in custody, *held* admissible. *State vs. Clayton & Carter*..... 581
 21. Irrelevant and immaterial questions to a witness, *held* properly rejected..... *Ib.*
- Vide *Bills of exchange and Promissory Notes*, 2, 3. *Magistrates' Judgment*. *Pleading*, 5. *Presumptions*. *Sum Pro*. *Trespass to try Title*. *Warehousemen*. *Wills and Testaments*.

EXECUTORS AND ADMINISTRATORS.

1. An administrator cannot maintain an action against a sheriff for the proceeds of chattels sold under an execution against the intestate lodged in his lifetime, even though there be no other assets, and there are funeral and other expenses of the last illness unpaid. *Haynsworth vs. Frierson*..... 476
- Vide *Administration*. *Contract*, 2. *Costs*. *Limitations*, *Statute of*. *Powers*. *Sheriff's Deed*. *Single Bill*, 7.

EXECUTOR DE SON TORT.

1. A widow for claiming and taking a horse as exempt from levy and sale under the Homestead Act, is not liable as executrix *de son tort* of her husband. *Frierson vs. Wesberry*..... 353

FACTORS.

1. Where factors, under a clear mistake as to the law, wrote to their principal that they had sold his cotton, when in fact there was a mere agreement to sell, not binding under the statute of frauds, and authorized him to draw by reason of the sale—he having previously expressed a wish that his factors should never advance for him—and the cotton having been burnt the next day, again wrote that they had sold the cotton and that it belonged to the purchaser at the time it was burnt: *Held*, in an action for the value of the cotton sold, that the factors were not liable to their principal. *Huguenin vs. Legare & Colcock*..... 204
2. The factors *held* not liable for not insuring, the jury finding upon doubtful evidence that they were under no agreement to insure *Ib.*
3. A shipped wheat and flour from Knoxville, Tennessee, to B in Charleston, South Carolina:—*Held*, upon examination of the evidence, that B was not the purchaser, but that he was the mere consignee for sale, and that the title remained in A. *McPherson vs. Neuffer & Hendrix*..... 267
4. The evidence further examined and B *held*, to have no lien for advances made, acceptances to mature, expenses paid, or for general balance..... *Ib.*
5. Where a factor, to whom goods have been consigned, refuses upon demand to deliver them, assigning reasons for the refusal and making no mention of a lien for expenses paid, such failure to mention the lien is evidence of its waiver..... *Ib.*

Vide Account Current.

FAILURE OF CONSIDERATION.

Vide Single Bill, 4, 7.

FELONY, COMPOUNDING.

Vide Single Bill, 8.

FORMER RECOVERY.

Vide Partners, 3.

FRAUD.

1. Though an executed contract, as a conveyance of land, cannot be

avoided, as between the parties, by showing that it was made with intent to defraud creditors, yet in an action brought to enforce a bond, or other executory contract, the defendant may show that it was made to defraud creditors, and thus defeat plaintiff's recovery. *Harvin vs. Weeks*..... 601

2. Possession after an absolute conveyance of land is a badge, but not conclusive evidence, of fraud. *Belk vs. Massey*..... 614

Vide *Insolvent Debtors and Prison Bounds Acts*, 3.
Registry, 2.

FRAUDS, STATUTE OF.

1. A verbal agreement to deliver one hundred and twenty-five head of beef cattle, at five cents per pound, to be driven from Florida to Charleston, is within the 17th section of the Statute of Frauds, and therefore void. *Barbour vs. Disher*.. 347
2. A right to erect a mill on the land of another is an incorporeal hereditament and an agreement conferring such right must be in writing. *Trammell vs. Trammell*..... 471 ✓

GATES.

1. A neighborhood road, or *private path*, as it is called, is within the provisions of the Act of 1855, (12 Stat. 408,) authorizing the erection of gates upon all such roads as are not public highways. *State vs. Jefcoat*..... 529

GRANTS.

Vide *Tenants in Common*.

GUARANTY.

1. Defendants wrote to plaintiffs as follows: "We take pleasure in commending Mr. C. to you as a gentleman worthy of your confidence, and if he should have any dealings with you, we hereby bind ourselves to make good and pay any amount he may be indebted to you on settlement, not exceeding \$1500. This guaranty to remain in full force until revoked by us:"—*Held*, that, in order to bind the guarantors notice of acceptance was necessary to be given to them. *Wardlaw, Walker & Burnsides vs. Harrison* 626

GUARDIAN.

1. The Ordinary of the district in which a will has been proved, and in which the executor makes his returns, may appoint a

guardian for a minor entitled to a legacy, under the will, of five hundred dollars, and may cite such guardian to account before him. *Trumbo vs. Reigne*..... 189

HABEAS CORPUS.

Vide Parent and Child, 3.

HIGHWAYS.

1. In trespass *quare clausum fregit*, under a plea of justification by reason of an alleged "public highway" over which defendant passed, and from which he removed obstructions, any public way, whether by land or water, and by whatever name called, may be shown. *Heyward vs. Chisolm*..... 253
2. Adverse use by the public, for more than twenty years, with small boats and occasionally with flats and rafts, of a ditch through a marsh:—*Held*, to establish the ditch as a highway..... *Id.*
- 3 One cannot have a private right of way over and along a public road. *State vs. Jefcoat*..... 529

Vide Damages, 1. Gates. Road Laws.

HOMESTEAD ACT.

1. Where a widow claimed and was allowed the benefit of the Homestead Act, as to the land, before the Act was repealed, and then the personal estate of the husband, in her possession, he having no personal representative, was, also before the repeal of the Act, levied on by the sheriff under an execution against the husband, and at the sale after the repeal of the Act, the widow claimed a horse as exempt from levy and sale under the Homestead Act:—*Held*, that the claim was proper, and that the horse was exempt from levy and sale. *Frierson vs. Wesberry*..... 353

Vide Executor De Son Tort.

HUSBAND AND WIFE.

1. A wife cannot, by appointing an attorney under the Act of 1712, maintain trover in her own name, for the conversion of a chattel in which she has the legal title with right of immediate possession, even though she be living apart from her husband and he interpose no claim. *Myers vs. Griffiths & Powell*..... 560
2. Where the wife acquires the legal title in severalty to chattels

- with right of immediate possession, the title becomes instantly vested in the husband, and he may sue alone for a conversion of them. *Myers vs. Griffiths & Powell*..... 560
3. Where husband and wife join in an action on the case for obstructing a right of way, appurtenant to the wife's inheritance, and wife dies pending the action, the suit does not abate, but husband may go on and recover judgment; and in such case the measure of damages will be the whole amount of damage sustained, until the death of the wife, and afterwards a proportion equal to the husband's interest in her estate as her heir. *Jeftcoat vs. Knotts & Redmund*..... 649
- Vide *Dower. Evidence, 12, 13. Parent and Child, 2, 3. Renunciation of Inheritance.*

IDIOTS AND LUNATICS.

Vide *Necessaries.*

INDICTMENT.

Vide *Bastardy. Negro Stealing.*

INFANT.

Vide *Guardian. Parent and Child, 2, 3.*

INHERITANCE.

Vide *Renunciation of Inheritance.*

INSOLVENT DEBTORS' AND PRISON BOUNDS' ACT.

1. A discharge under the prison bounds' Act is a bar to an action on the prison bounds' bond. *Hamilton vs. Hamilton*..... 351
2. Whether a suggestion may be filed contesting an applicant's right to his discharge under the Insolvent Debtors' Act, is a matter within the sound discretion of the Circuit Judge. *Ex Parte Maffet*..... 358
3. The charges of fraud in such case should be clear, distinct and specific and not founded on hearsay and rumor..... *Id.*
4. Application for the benefit of the Insolvent Debtors' Act need not be made at the next term after petition filed, even though ninety days may elapse between the filing of the petition and the sitting of the Court. The petitioner is in time if the

notice be given to the second term, and the application be then made. *Ex Parte Cantey*..... 520

Vide Trover, 4.

INTEREST.

Vide Single Bill, 6.

JOINT CONTRACT.

Vide Partners, 8.

JUDGMENT.

Vide Arrest of Judgment. Magistrate's Judgment. Partners, 1, 3. *Set-off*, 1, 2, 5, 6. *Trespass to try Title*, 6.

JURIES.

1. A *venire facias* to summon a jury is good, although the sheriff has not endorsed on it the fact of entry in his office. *State vs. Clayton & Carter*..... 581
2. A grand jury need not consist of more than twelve members..... *Ib.*
3. The 97th rule of Court, prescribing a new mode of impanneling a petit jury, is not unconstitutional..... *Ib.*

JURISDICTION.

Vide Administration. Warranty, 6.

LANDLORD AND TENANT.

Vide Trespass to Try Title, 3, 4.

LAPSE OF TIME.

Vide Presumptions. Registry, 2.

LETTERS OF ADMINISTRATION.

Vide Administration.

LICENSE.

1. A license granted by the City Council of Charleston after suit commenced for a penalty, is by an ordinance no release of the

INDEX.

757

penalty, although the license by its terms, takes effect from a day previous to the commission of the offence, and covers the date of the offence. *City Council of Charleston vs. Schmidt.* 343

Vide Nuisance, 2.

LIEN.

Vide Factors, 4, 5.

LIMITATION OF ESTATES.

1. Testator devised land "to F. L., widow of C. L., deceased, and if it should happen, that said F. L. should die without heirs, lawfully begotten of her body, that then the said land shall descend to her sister J.'s children, in common."—*Held*, that F. L. took a fee-simple estate in the land—and that the limitation to J.'s children was void for remoteness. *Curry vs. Sims & Jeter*..... 489
2. A devise of land to one "in fee simple for life" carries the absolute estate. *McAllister vs. Tate*..... 509

LIMITATIONS, STATUTE OF.

1. Where an account not barred by the statute of limitations was presented to an administrator, who "made no objection, and expressed his willingness to pay:"—*Held*, that such promise was sufficient to arrest the currency of the statute, and furnished a new starting-point for its commencement. *Johnson vs. Ballard*..... 178

LIQUIDATED DAMAGES.

Vide Damages.

LOCATION.

Vide Trespass to Try Title, 7, 8.

LOST DEED.

Vide Evidence, 1, 18, 19.

MAGISTRATE'S JUDGMENT.

1. Since the Act of 1839, a magistrate's judgment can be proved only by his book, which the Act requires him to keep—the execu-

tion and oath of the magistrate are insufficient. *Etters vs. Etters*..... 413

MAINTENANCE.

Vide Parent and Child, 1.

MANNING.

Vide Road Laws.

MARKETS.

1. The Town Council of Winnsboro have the power to pass an Ordinance prohibiting the sale of butcher's meat within the corporate limits except at the public market. *Town Council vs. Smart*..... 551
2. Laws regulating markets are not in restraint, but in regulation of trade—they are not in violation of the ordinary rights of the citizen..... *Ib.*

MARRIED WOMAN.

Vide Husband and Wife. Renunciation of Inheritance.

MAYHEM.

1. The common law rule, that, in cases of Mayhem, the Court may increase the damages, *super visum vulneris*, does not exist in South Carolina. *McCoy vs. Lemon*..... 165

MERCHANTS' BOOKS.

Vide Evidence, 7.

MONEY HAD AND RECEIVED.

Vide Contract, 1.

MONEY PAID BY MISTAKE.

1. H, the drawer of an accepted bill of exchange, payable at New Orleans, at thirty days, negotiated it to the bank. The bill having been protested for non-payment, H paid the amount to the bank, but at that time the bill had been paid by the acceptor, (who had accepted for the accommodation of H,) to the agent of the bank. This was then unknown, either to

INDEX.

759

H, or the bank:—*Held*, that H was entitled to recover from the bank the amount paid by him, as so much money paid by mistake—although the bank claimed the right to apply it to the account of the acceptor. *Henderson vs. Bank.* 44

MORTGAGE.

1. The Act of 1791, in relation to mortgages, does not apply where the mortgagor is "out of possession." To such case the common law applies, and after condition broken, the mortgagee may maintain trespass to try title against a purchaser from the mortgagor, who has entered under his purchase. *Mitchell vs. Bogan*..... 686
2. A clause in a mortgage of real estate, giving the mortgagee power to sell is valid: *Semle*,..... *Ib.*
3. A mortgage of land delivered before delivery of a deed for the same land executed and dated before the mortgage, but not delivered until afterwards, takes precedence of the deed..... *Ib.*

NECESSARIES.

1. A demand for necessities may be recovered against one *non compos*, upon the implied promise. *Johnson vs. Ballard*..... 178

Vide Contract, 2.

NEGLIGENCE.

Vide Evidence, 14.

NEGRO STEALING.

1. Two or more may be jointly indicted for negro stealing, and one may be convicted and the others acquitted. *State vs. Clayton & Carter* 581
2. In a joint indictment, one may be charged with inveigling, stealing and carrying away a slave, and another, or others, with hiring, aiding or counselling him to do so..... *Ib.*
3. One may be guilty of stealing a runaway slave..... *Ib.*

NEW TRIAL.

1. A contradictory verdict, showing that other counts were considered besides those upon which the verdict is expressed upon its face to be found, is, it seems, good ground for a new trial. *Ryan vs. Copes*..... 217

2. New trial granted, because material allegations were not proved.
Ryan vs. Copes..... 217
3. The facts reviewed and the verdict held not to be so clearly
against the evidence, that the Court would be justified in set-
ting it aside and ordering a new trial. *Belk vs. Massey*..... 614
Vide *Single Bill*, 8. *Trespass to Try Title*, 7, 8.

NOTICE.

Vide *Guaranty. Registry. Set-off*, 4.

NUDUM PACTUM.

Vide *Release. Single Bill*, 4.

NUISANCE.

1. In an action for a private nuisance in erecting and working a steam
cotton-press, it is sufficient to allege, increased danger from
fire and liability of boilers to explode, thereby rendering plain-
tiff's dwelling unfit for habitation, and impairing the value of
his property, though the actual occurrence, neither of a fire,
nor of the explosion of a boiler, is alleged. *Ryan vs. Copes*.. 217
2. Though in determining whether a steam cotton-press is a private
nuisance, a license from the city council to erect and work
the press, will, as evidence, be entitled to high consideration,
yet it is not conclusive, for the annoyances occasioned by the
press may have been so great that the council could not
legalize them; or it may be shown that the license was
abused, and that the annoyances complained of were not the
necessary incidents of a steam cotton-press, and, therefore,
were not protected by the license..... *Id.*

Vide *Gates*.

OFFICE COPY.

Vide *Evidence*, 6.

ORDINARY.

1. An action will not lie against the Ordinary for the plaintiff's share
of the proceeds of land sold for partition under the Acts of
1839 and 1842 (11 Stat. 44, 232), until judicial proceedings
have been had before the Ordinary, and the plaintiff's share
ascertained. *Spires vs. Ordinary*..... 578

Vide *Administration. Administration Bond. Guardian*.

PARENT AND CHILD.

1. A son-in-law is not bound to maintain his father-in-law. *Johnson vs. Ballard*..... 178
2. Upon a question between father and mother as to the custody of their infant child, the law gives the preference to the father as the head of the household, and without sufficient cause shown the custody will not be given to the mother. *Hewett, Ex parte*..... 326
3. Where a father seeks by *habeas corpus* to obtain possession of his infant son, the discretion of the Court in discharging the infant from illegal restraint, is not limited to protecting him in returning, but it may, even where the infant is of the age of choice, order that he be delivered to the father. *Williams, Ex parte*..... 452

PARTNERS.

1. A judgment confessed by one partner in the name of the firm may be ratified by the other partner so as to make it valid, and the same rule applies to a corporation where the charter makes the corporators liable as partners. *Bivingsville Cotton Manuf. Company vs. Bobo*..... 386
2. The evidence examined and *held* sufficient to show the ratification of such a judgment..... *Ib.*
3. A recovery against two partners, where there are more, is no bar to a subsequent suit against all the partners on the same cause of action. *Union Bank vs. Hodges & Smith*..... 480
4. After dissolution of the firm, and notice to the debtor not to pay a certain partner, the debtor will not be discharged by taking from that partner a receipt for the debt, the consideration of the receipt being a release of the private debt of such partner to the debtor. *Sims vs. Smith*..... 565

PATENT.

Vide *Warranty*, 6.

PAYMENT.

Vide *Account Current*, 2. *Release*.

PENALTY.

Vide *License*.

PHYSICIAN'S BILL.

Vide *Bailment*, 2, 3.

PLEADING.

1. Plaintiff having failed to show performance of a special contract to build a bridge for defendants according to the specifications agreed on :—*Held*, that he could not recover on the common counts for work, labor and materials—the defendant never having waived the special contract and having refused to accept the bridge. *Geer vs. Brown*..... 42
 2. Defendant pleaded in abatement the marriage of plaintiff, a female, pending the suit. Plaintiff replied; appointment of an attorney under the Act; and the plea was overruled. At the next term, defendant pleaded the coverture of plaintiff, alleging her marriage to another husband before suit brought :—*Held*, that the second plea was bad after the first was overruled. *Mitchum vs. Droze*..... 196
 3. After one plea in abatement, defendant cannot plead another in the same degree..... *Ib.*
 4. In an action of debt on a bond for the payment of money, the plea of *non-damnificatus* is bad on general demurrer. *Ingram vs. Wilson*..... 461
 5. Where several defendants are sued upon a joint contract the proof must show a joint contract by all, or the plaintiff must fail. *Hammaraskold vs. Bull*..... 493
- Vide *Account Current*. *Administration Bond*. *Bail Bond*.
Highways, 1. *Public Agents*.

POWERS.

1. A contract by testator to sell a particular tract of land, does not revoke, so far as it relates to that tract, a power in his will giving his executors authority to sell his lands for division. The executors may carry out the contract and convey the tract to the purchaser. *Douglass vs. Dickson*..... 417

Vide *Mortgage*, 2.

PRACTICE.

1. At the return term of the writ, the defendant moved to set aside the service, which motion the Circuit Judge granted;

- but, on appeal, his decision was reversed. At the next term, defendant moved for leave to appear and plead, and his motion was refused. On appeal, *held*, that defendant was not in default, and that he had the right, under the circumstances, to appear and plead at the second term. *Barns, Bateman & Rudderow vs. Bell*..... 20
2. The 23d and 25th rules of Court give directions to parties in reference to motions for continuance, but impose no restraint upon the discretion of the Court. *Chalk vs. McAlily*..... 153
- Vide *Juries*, 3. *Sci. Fa. Teste*.

PRESUMPTIONS.

1. To rebut the presumption of a title derived from trustees, arising from twenty years' possession, it is not sufficient to show that the trustees were denied power to sell by the will creating the trust if the will gives them the power to exchange. *Trustees of the Wadsworthville Poor School vs. McCully*..... 424
2. An Act suspending the statute of limitations as to certain lands, does not affect the presumption of a conveyance from the owner, arising from twenty years' possession..... *Ib.*
3. After the lapse of more than twenty years the Court will not set aside the verdict of guilty upon an indictment for misdemeanor, and the sentence indorsed upon the record, upon the ground that the defendant had not been arrested, nor had entered into recognizance. In such case the law presumes *omnia esse rite acta*, especially if it appears that seven years after the trial and sentence, the defendant was served with *sci. fa. quare executio non*, made default, and that execution issued. *State vs. Hatcher*..... 525

Vide *Highways*, 2.

PRINCIPAL AND AGENT.

Vide *Factors*, 3, 4, 5.

PRISON BOUNDS ACT.

Vide *Insolvent Debtors' and Prison Bounds Act*.

PRIVATE PATHS.

Vide *Gates*.

PROCESS.

Vide Teste.

PROMISSORY NOTES.

Vide Bills of Exchange and Promissory Notes. Release.

PUBLIC AGENTS.

1. Declaration in assumpsit against A, B and others, styled them "Chairman and Commissioners of the New State Capitol," and the bill of particulars, filed with the declaration, set forth charges for work done for the State:—*Held*, that the defendants were sued as public agents, and as such were not liable; and, even if sued as individuals, still, upon the pleadings and the evidence, they were not liable, no special contract, or special circumstances, being alleged or shown, which subjected them to personal liability. *Hammerskold vs. Bull*..... 493
2. Where public agents are sought to be made liable as private individuals upon a contract made for the public benefit, the declaration should set out the special circumstances, as that they had exceeded their authority or had a fund with which to pay the plaintiff, upon which it is sought to make them liable, or the plaintiff cannot recover..... *Id.*

RAILROADS.

1. The right to claim compensation from the Wilmington and Manchester Railroad Company for land taken for the track of their road, belongs to the owner of the tract at the time the road was finished through it, or his legal representative, and not to a vendee who purchased the tract from the owner after the road was finished through it. *Lewis vs. Wil. and Man. Railroad Company*..... 91

RECEIPT.

Vide Release.

RECORDING.

Vide Registry.

REGISTRY.

1. A previous conveyance of the land, not registered within the pre-

INDEX.

765

- scribed, time, but registered in the interval between a sheriff's sale and his conveyance, will not under the Registry Acts be postponed to the sheriff's conveyance. *Leger vs. Doyle*..... 109
2. The lapse of twenty years between the date of the previous conveyance and its registration, where the debtor has remained in possession acknowledging the rights of others under the conveyance, will not of itself make the conveyance fraudulent, or ineffectual either against the debtor himself, or against a purchaser at sheriff's sale, whose conveyance was executed after the registration of the previous conveyance although the sheriff's sale preceded the registration..... *Ib.*
3. Under *Steel vs. Mansell*, 6 Rich. 437, the registration of a conveyance registered after six months, has no relation back in determining the order of priority under the Registry Acts, but takes effect from the date of the registration to defeat all subsequent conveyances..... *Ib.*
4. Where a deed of land is recorded after the time prescribed by law, notice will be presumed from the time it is recorded. *Belk vs. Massey*..... 614

RELEASE.

1. A having the joint promissory note of B & C, indorsed upon the note after it became due a receipt, not under seal, of one half the amount from B, "being his share in full of the within note, from the payment of which or any part thereof, I hereby release him":—*Held*, that B was not discharged; that A might maintain a joint action against him and C for the balance. *Hope vs. Johnston & Cavis*..... 135
2. A release not under seal, in consideration of part payment in money of a debt past due, is no discharge of the balance—the release being without consideration..... *Ib.*
3. The indorser of a note, while it was yet in the hands of the indorsee, released the drawer "from all claims, causes of action in law or equity," &c., and shortly afterwards paid the indorsee and took the note back: *Held*, that the release covered the indorser's contingent right to the note and extinguished it. *Guynemer vs. Lopez*..... 199

Vide Evidence, 15. *License*.

RENUNCIATION OF INHERITANCE.

1. A married woman's renunciation of her inheritance, if made within

seven days from the execution of her deed, is null and void.

Bruce vs. Perry.....✓..... 121

2. Where the magistrate's certificate declares that the seven days had expired, and the dates show the contrary, *prima facie*, the dates will be taken to show the true time, and the *onus* will be on the purchaser, to show that the seven days had in fact expired, before the renunciation was made..... *Ib.*

RETAILING.

Vide Trading with Slave.

REWARD.

Vide Contract, 4.

ROAD LAWS.

1. The Act of 1855, to establish the judicial district of Clarendon, appoints Commissioners, who, "at the expense of the district," are to purchase a tract of land, "upon which they shall lay out a village," to be called Manning:—*Held*, that it is the duty of the Commissioners thus appointed to lay out and open the streets, and that, until opened and dedicated as highways, the Commissioners of Roads have no jurisdiction over them. *Commissioners vs. Durant*..... 440
2. The Commissioners of Roads have the power to make alterations in the public roads; and a deviation for one mile *held* to be such an alteration as they have power to make. *State vs. Commissioners of Roads*..... 485

Vide Gates.

SALE.

Vide Contract, 3. Factors, 3.

SALVAGE.

1. Where salvage is awarded to a slave as one of the crew of a saving vessel, it belongs not to the owner of the slave, if he be hired out, but to the party to whom the slave was at the time hired. *Gourdin vs. West & Robertson*..... 288

SCI. FA.

1. Where plaintiff dies after interlocutory judgment founded on defendant's default to appear, and plaintiff's administrator issues *sci. fa.* on such interlocutory judgment, defendant is not entitled to an imparlance merely on entering an appearance to such *sci. fa.*, but will be allowed it only on sufficient cause shown. *Godbold vs. Gordon*..... 36
2. It is not sufficient cause in such case to show that defendant denies plaintiff's representative character; such denial being founded on the objection that the ordinary, in the suit for letters, had not cited all in interest..... *Ib.*

SEAL.

Vide *Evidence* 6. *Single Bill*.

SET-OFF.

1. In an action against A he cannot set up as discount a judgment-recovered in the name of B for the use of A. *Harrel vs. Petty*. 373
2. A judgment must be assigned in writing, or the beneficial owner cannot sue upon it in his own name, or plead it in discount.. *Ib.*
3. Where in an action by the assignee of a sealed note, the defendant pleads as discount a demand due him by the obligee before action commenced, the onus is on the plaintiff to show that the note was assigned before the demand was due, otherwise the discount will be allowed. *Jervey vs. Straus*..... 376
4. Where a chose in action, not assignable under the Act of 1798, is assigned, the debtor may avail himself of any discount against the assignor, acquired by the debtor after the assignment and before notice of it. *Burkett vs. Moses*..... 432
5. The Court will not order one judgment set-off against another, where it appears that one of the judgments is owned by a third person, and that his equitable ownership was known to the party making the motion when the cause of action was given. *Meador vs. Rhyne*..... 631
6. The practice of ordering one judgment set-off against another, is not founded on the law of discounts, but springs from the general jurisdiction of the Court over its suitors; and in exercising it, the Court will always regard the equitable rights of persons not parties to the suit..... *Ib.*

SHERIFF.

1. Sale by a sheriff in 1826 under a levy of land made four years before by his predecessor, sustained. *Leger vs. Doyle*..... 109
 2. An ex-sheriff may buy land sold under a levy which he made when he was in office..... *Ib.*
- Vide Escape. Executors and Administrators.*

SHERIFF'S DEED.

1. Lands bid off at sheriff's sale after the purchaser has made his will, go, not to the legatee or devisee, but to the heir-at-law, to whom the sheriff's deed should be made. This is the rule, although the executor may be compelled to pay the purchase money out of the bequeathed personal estate. *Landrum vs. Hatcher*..... 54
2. A defendant in execution, whose land has been sold at sheriff's sale, may show that the sheriff's deed is void, because made not to the purchaser or his representative, but to one who had no right to it..... *Ib.*
3. When a sheriff sells land under *fi. fa.*, his deed of conveyance and not the contract made by the bidding, transfers the debtor's title, and no relation back will be had to give priority to the conveyance. *Leger vs. Doyle*..... 109

SHERIFF'S SALE.

Vide Registry, 2. Sheriff. Sheriff's Deed.

SINGLE BILL.

1. An instrument under seal, in form a single bill, given and delivered by a grandfather to the husband of his granddaughter, and intended as an advancement, payable one day after date, but with right of collection postponed until donor's death:—*Held*, valid between the parties, and binding as an irrevocable contract upon the executors of the donor. *Carter vs. King*..... 125
2. It is no objection to a bond or single bill, or even, it seems, to a promissory note, that it is made payable at the obligor's, or drawer's death..... *Ib.*
3. The doctrine of *nudum pactum* is wholly inapplicable to sealed instruments..... *Ib.*

4. A defendant may always show in defence, in an action upon any instrument, *failure* of consideration either entire or partial, but where the action is upon an instrument under seal, as a bond or single bill, he cannot show that it was without any consideration at all—a consideration not being necessary to the validity of the instrument as between the parties themselves and their representatives. *Carter vs. King*..... 125
5. Creditors may, after the death of the obligor, show an entire want of consideration for the purpose of having the payment of the bond or single bill postponed to contracts founded upon valuable consideration; *semble*..... *Ib.*
6. A single bill payable one day after date, with right of collection postponed until the obligor's death, bears interest from the day after its date..... *Ib.*
7. A qualified as executor on a will of C, admitted to probate in common form, sold the goods and chattels of testator and took sealed notes for the purchase money. A later will, appointing B executor, was afterwards discovered and admitted to probate, and A's letters testamentary were revoked and declared null and void. B, having qualified as executor, sued the purchasers from A in trover, and against some he recovered, and others delivered up the property: *Held*, that the consideration of the single bill given to A, had failed, and that he could not recover thereon. *Vance vs. Davenport*..... 517
8. A had a considerable sum of money stolen from him by the slave of B, a part of which was recovered, and for the balance B gave A his single bill, and A did not prosecute the slave for the felony. The jury having found, upon the evidence, that an agreement not to prosecute the slave formed no part of the consideration of the single bill, on appeal, *held*, that the verdict was not so clearly unsupported by the evidence that it could be disturbed. *Hudson vs. Brown*..... 643

SLAVES.

1. For beating a slave in the possession of a bailee, the owner is not entitled to recover the penalty of fifty dollars imposed by the Act of 1839, 11 Stat. 58. *Hadden vs. Leibes Schultz*..... 506
Vide Contract, 2. Salvage. Trading with Slave.

SUM. PRO.

1. Where, in the process jurisdiction, the plaintiff uses the defendant's answer to interrogatories, he must rely upon that alone, and cannot resort to other evidence. *Harrison vs. Dodson*... 48

2. The rule also is, that if the defendant's answer charges him with a liability, he cannot discharge himself by his answer; but where many particulars enter into the answer to show the liability, the rule does not apply, and the whole must be taken, although facts are stated, showing the defendant's non-liability. *Harrison vs. Dodson*..... 48

TENANTS IN COMMON.

1. Where there are separate grants of the same land, bearing the same date, and founded upon surveys certified and recorded on the same day, and purporting to have been made upon warrants issued on the same day, the grantees take as tenants in common. *Young vs. De Bruhl*..... 638

TESTAMENTARY PAPER.

Vide *Wills and Testaments*, 2.

TESTE.

1. Process in the City Court of Charleston, may bear test before the accrual of the cause of action. *City Council vs. Schmidt*. 343

TRADING WITH SLAVES.

1. A distiller, vendor, or retailer of spirituous liquors cannot be indicted under the Act of 1817 for trading with a slave, where the trading consisted of selling spirits to a slave. In such case he can only be indicted under the Act of 1834, for selling spirits to a slave. *State vs. Brock*..... 447
2. To charge one with purchasing ten cents in coin from a slave is no offence..... *Ib.*

TRESPASS.

Vide *Case*, 2.

TRESPASS QUARE CLAUSUM FREGIT.

Vide *Easements*, 5.

TRESPASS TO TRY TITLE.

1. Where judgment for the defendant in a former action between the same parties, is relied upon, under the Act of 1744, (3 Stat. 612,) as a bar to a second action of trespass to try title, com-

menced more than two years after the first was dropped, it must appear with such certainty as the common law requires in cases of estoppel, (that is, "certainty to every intent,") that both actions were for the same land. *Binda vs. Benbow*..... 24

2. Where plaintiffs sued out their writ in trespass to try title, for "a certain plantation or tract of land of the plaintiffs, situate on the waters of Santee river," and then, without proceeding further, let fall their action, and judgment was entered for the defendant:—*Held*, that this judgment was no bar to a second action, brought more than two years afterwards, between the same parties and in the same district, for a "certain plantation and close of the plaintiffs," described generally as lying within the district, because it did not appear to the Court, that the two actions were for the same land..... *Ib.*
3. Upon evidence, in trespass to try title, that defendant claimed the land as his own, and that his son, considering it his father's, entered, and occupied it with the knowledge of defendant and without objection from him, the jury found the defendant a trespasser, and, on appeal, their verdict was not disturbed... *Ib.*
4. Trespass to try title will lie against the landlord, though he never was in possession, the entry being by his tenant..... *Ib.*
5. Where there is a recovery against the defendant in an action of trespass to try title, and he subsequently acquires title by taking out a grant and re-enters, the recovery in the first is no estoppel in a second action for the same land. *Bank vs. Bridges*. 87
6. A judgment in trespass to try title against a corporation of which B was agent and a stockholder, is not conclusive against B claiming under a junior grant to himself, but the record may be given in evidence against him on the question of location. *Bank vs. Bobo*..... 597
7. New trial granted, the verdict being against the evidence upon a question of location..... *Ib.*
8. The Court will more readily grant a new trial upon a question of location than upon most other questions of fact..... *Ib.*

Vide *Mortgage*, 1.

TROVER.

1. In trover, for a certificate of shares in Bank Stock, the plaintiff is entitled to recover the full value of the shares. *Connor vs. Hillier* 193

2. A, who had shipped goods to his agent for sale, drew a bill of exchange on the agent in favor of C, and delivered to C the railroad receipts for the goods:—*Held*, that such delivery was no transfer of the title so as to enable C to maintain trover for the goods. *McPherson vs. Neuffer & Hendrix*..... 267
 3. Where one wrongfully sells or uses the goods of another, it is itself a conversion, and demand and refusal or offer to pay charges need not be proved..... *Ib.*
 4. Where pending an action of trover in which bond has been given under the Act for the production of the chattel, the defendant, being under arrest at the suit of another, is discharged under the Insolvent Debtors' Act, the plaintiff in trover may nevertheless proceed with his action to a recovery, for otherwise he could not have the benefit of the bond. *Green vs. Foskett*... 332
- Vide *Administration*, 1. *Contract*, 8. *Costs*, 2. *Husband and Wife*, 1, 2.

UNSOUNDNESS.

Vide *Warranty*, 2, 3.

USURY.

Vide *Bills of Exchange and Promissory Notes*, 6.

VENDEE.

Vide *Railroads*.

VENIRE FACIAS.

Vide *Juries*, 1.

VERDICT.

Vide *Arrest of Judgment*.

WARRANTY.

1. That questions of unsoundness where the disease is chronic, like rheumatism, it is not necessary to show that the symptoms existed at the time of the sale, for subsequent incidents and appearances may show that the disease existed before the sale, although the symptoms had not then been observed. *Crouch vs. Culbreath*.....

INDEX.

773

2. The point ruled in *Stephens vs Chappell*, 3 Strob. 80, that, "the disease must be in a formed state evidenced by symptoms before it can affect the sale," was intended to apply only to cases of fever having no fixed law for their commencement. *Crouch vs. Culbreath*..... 9
3. The term "organic" used in the opinion of the Court of Appeals in that case was inappropriate, and the Court prefer to adhere to the precise ruling of the Circuit Judge in that case. *Ib.*
4. A warranty in the usual form against the grantor and his heirs is a covenant as well of seizin as for quiet enjoyment, not against the world, but against the grantor and his heirs. *Faries vs. Smith*..... 80
5. Where the grantee is evicted by one who claims under an older deed from the grantor, such eviction is a breach of the covenant for quiet enjoyment against the warrantor himself. *Ib.*
6. B. having a patent for certain improvements in looms, assigned to A with warranty that the invention was original, and made upon an entirely new principle in mechanics never before patented. In an action of covenant by A against B in which the breaches were assigned in the terms of the warranty : *held*, that the Court had jurisdiction of the matter ; that the patent was not conclusive that the invention was original and upon a new principle ; and that A, upon proof of the breaches assigned, was entitled to recover. *Wright & McCann vs. Wilson*. 144

WAREHOUSEMEN.

1. Where a railroad company, after transporting cotton as carriers, unloaded their cars and deposited the cotton in their yard, where it was burnt the next evening, the company, without proof as to how the fire occurred, were *held* liable, the jury having found them so, under instructions which regarded them as warehousemen and liable only for negligence. *Wardlaw, Walker & Bursides vs. Railroad Company*..... 337
2. Instructions to the jury to the effect, that it was right to require the Company to show how the fire occurred, and that in the absence of such proof the jury might well hold them liable : *held*, proper..... *Ib.*

WAYS.

Vide *Damages*, 5 6. *Highways*, 3.

WIDOW.

Vide Executor de son tort. Homestead Act.

WILLS AND TESTAMENTS.

1. An instrument intended to take effect at the donor's death, but not having the formalities of a will, will not be held testamentary and therefore void, if it can operate in some other character which appears to have been intended. *Carter vs. King*..... 125
2. One who drew a will, will not be received as a witness, to explain the meaning of certain ambiguous words. *McAllister vs. Tate*..... 509

Vide Limitation of Estates.

WITNESS.

Vide Bills of Exchange and Promissory Notes, 3. Evidence, 2, 3, 8, 9, 15, 16. Powers. Sheriff's Deed, 1.

ERRATA.

For a list of Errata see next Volume.

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